

**NOMINATION OF JUDGE CLARENCE THOMAS TO BE  
ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES**

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**HEARINGS**

BEFORE THE

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**ONE HUNDRED SECOND CONGRESS**

FIRST SESSION

ON

**THE NOMINATION OF CLARENCE THOMAS TO BE ASSOCIATE JUSTICE  
OF THE SUPREME COURT OF THE UNITED STATES**

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SEPTEMBER 17 AND 19, 1991

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**Part 2 of 4 Parts**

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# NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, SEPTEMBER 17, 1991

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:06 a.m., in room 325, Senate caucus room, Russell Senate Office Building, Hon. Edward M. Kennedy, presiding.

Present: Senators Biden, Kennedy, Heflin, Simon, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

## OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. The committee will come to order.

I would like to welcome a very distinguished panel this morning. The Judiciary Committee undertakes a very serious constitutional duty when it considers the nomination of a Supreme Court Justice. The expertise each of you brings to this process will, I am sure, make your views of significant interest to the committee.

Each of you has made an important contribution in an area of great concern in these hearings: Civil rights and the role of the Supreme Court in protecting individual liberties.

Professor Days, would you be good enough to come up? He is from Yale Law School, has an extensive background in the area of civil rights, served as President Carter's Assistant Attorney General for Civil Rights, and before his tenure at the Justice Department as an attorney for the NAACP Legal Defense Fund.

Professor Edley of Harvard Law School has advanced degrees in both law and public policy. During the Carter administration, he served as an assistant to the President, and as the Assistant Director of the White House Domestic Policy Staff, and as a Special Assistant Secretary in the Department of Health, Education, and Welfare.

Professor Lawrence of Stanford Law School brings to these hearings an expertise not only in the law but also in education. He was an assistant professor at Harvard's Graduate School of Education and an attorney with the Harvard Center for Law and Education and the director of the Federation of Boston Community Schools. He has focused in both his writings and his teachings on issues of race and the Constitution.

We are delighted to have all of you here this morning. I think, as we heard from Chairman Biden, we have a very full day of wit-

nesses. We appreciate very much your effort in being here, but we hope that you will be able to respond to what questions we have—limit your presentation to 5 minutes and then respond to questions. All of the statements will be included in their entirety in the record.

According to our committee, I guess we have to swear you in. Do you swear the testimony you will give is the truth, the whole truth, and nothing but the truth, so help you God.

Mr. EDLEY. I do.

Mr. LAWRENCE. I do.

Mr. DAYS. I do.

Senator KENNEDY. Mr. Days, welcome. I had the good opportunity to work with, I think all of you, on a number of different public policy issues, and we know of your continuing interest in all of these matters on the Constitution. So we are very fortunate to have you.

Professor Days.

**TESTIMONY OF DREW S. DAYS, PROFESSOR, YALE LAW SCHOOL; CHRISTOPHER EDLEY, JR., PROFESSOR, HARVARD LAW SCHOOL; AND CHARLES LAWRENCE, PROFESSOR, STANFORD LAW SCHOOL, ON BEHALF OF THE SOCIETY OF AMERICAN LAW TEACHERS**

Mr. DAYS. Senator Kennedy, thank you for allowing me to testify this morning before this committee during what we all recognize is a very important proceeding. I can assure you that I respect the solemn responsibility that the Senate must discharge in its constitutional advise-and-consent role, and that I offer my testimony in that spirit.

I think it has been very difficult, Senator Kennedy and Senator Thurmond, for many people to come to grips with how they would respond to the nomination of Clarence Thomas. And I certainly include myself in that category. It has not been easy coming to a determination.

But one of the things that I was concerned about—and I think that thinking was very much affected by the opening statements that many of you made at the beginning of these proceedings about the role of a Justice of the Supreme Court, about the role of the Supreme Court as a guardian of the individual. I think Senator Heflin talked about the Supreme Court being the people's court, dealing with real issues and real people. Senator Thurmond, you talked about its responsibility to administer justice, to be concerned about that standard.

What I tried to do was place Clarence Thomas in that context, as a guardian of individual rights, as a member of a people's court. And the more I did that, the more difficult I found it to envision Clarence Thomas as the next Associate Justice of the Supreme Court.

My conclusion was very much affected by two things: First, reading his writings and reviewing some of the speeches that he has given on issues of concern to me, and issues that I have dealt with for most of my professional life, what strikes me about his articles and his speeches is their detachment from history; his treatment of

these issues as though they arose only yesterday or, indeed, in some cases the day before he began to speak about the issues, rather than as a consequence of very long, difficult, and hard and painful efforts by a number of people, including civil rights groups, to deal with problems of discrimination and exclusion.

For example, on the issue of goals and timetables, he rejects goals and timetables as a technique for dealing with discrimination in employment. But as we both know, although Judge Thomas does not seem to recognize this in many of his public positions prior to becoming a judge on the court of appeals, goals and timetables were a response to years of recalcitrance and resistance by employers and unions to efforts by civil rights groups and individuals to get employment opportunities on a fair basis.

He talks about school desegregation and criticizes *Green v. New Kent County*, a very important case in 1968, as though it were a concoction of the Supreme Court and not a response to years of massive resistance by school districts all across the country. In fact, I found it somewhat interesting, when Judge Thomas talks about his experiences, that there is no reference to the fact that in his home town—Savannah, GA—for many years people were fighting just to get one black child into a desegregated school.

In fact, in Savannah, for some years until the courts intervened, black children were being given IQ tests and all kinds of psychological batteries to determine whether they were suitable to sit next to white children in schools that had been segregated in the past.

He also talks about questions of discrimination in other areas, voting rights particularly. And, once again, as you know, Senator Kennedy, for many years the Justice Department and other private individuals tried to deal with voting discrimination, without success. It was required for the Congress to come in and pass the Voting Rights Act of 1965. And when Congress extended the Voting Rights Act in 1970, and 1975, and most recently in 1982, it was responsive to real, not imagined, problems of discrimination in that area.

The second concern that I have about Judge Thomas is his role as a civil rights enforcement official in both the Reagan and Bush administrations. Judge Thomas has attempted to compartmentalize his life into what he was before he became a judge and the fact that he is a judge now. But the truth is he was occupying a position as a bureaucrat that was set up by Congress because of its view that people needed special protection. There needed to be an Office for Civil Rights in the Department of Education. There needed to be an EEOC to make certain that people who were systematic victims of discrimination could get some relief.

And I think the way he occupied those two positions—for example, in the title IX area in the Department of Education, not seeing the necessity for extending title IX to discrimination against women in education, and his treatment of his responsibilities in the EEOC—did not reflect the type of sensitivity to that special responsibility and role that he had in the Federal Government.

Thank you very much.

[The prepared statement of Mr. Days follows:]

STATEMENT  
OF  
PROFESSOR DREW S. DAYS, III  
YALE LAW SCHOOL  
Before  
the  
SENATE JUDICIARY COMMITTEE  
ON THE NOMINATION OF  
CLARENCE THOMAS TO THE SUPREME COURT  
SEPTEMBER 17, 1991

Mr. Chairman, my name is Drew S. Days, III. I am a Professor of Law at Yale University. I want to thank you and the other members of the Committee for affording me an opportunity to appear before you this morning during your consideration of the nomination of Judge Clarence Thomas to become the next Associate Justice of the United States Supreme Court. I can assure you that I respect the solemn responsibility that the Senate must discharge in its constitutional "advise and consent" role and that I offer my testimony in that spirit.

I was struck and, I must say moved, by the common theme of many of your eloquent opening remarks when these hearings got underway a week ago about your visions of the place of the Supreme Court in our system of government. You spoke of the Court's duty "to administer justice,"<sup>1</sup> of the need for its members to be "able guardians of rights,"<sup>2</sup> of its function as "a people's court" dealing "with real people, their rights, duties, property, and most importantly their liberty."<sup>3</sup> You expressed your concern that it be "the champion of the less fortunate,"<sup>4</sup>

standing "against any ill winds that blow as [a] haven[] of refuge" for the "weak or helpless or outnumbered."<sup>5</sup>

There have been Supreme Courts during my lifetime that have lived up to the visions you painted. But we have lost in the last two years from the Court Justices Brennan and Marshall, two true guardians of our rights, two justices who understood their responsibility to be part of a "people's court", part of a haven of refuge for the weak and helpless and outnumbered. It will be some time before we are able to assess fully their invaluable contributions to the Court, our society, and to the lives of all of us. Of course, their majority opinions helped define and reinforce many of the rights we as Americans cherish today. But, even in dissent, their voices appealed to our very best instincts. And I have no doubt they were often successful, through the formal and informal workings of the Court, in opening the eyes of less perceptive and sensitive justices to the realities of life for the least fortunate among us.

With the departure of Justices Brennan and Marshall, the

Court and the Country deserve a new Associate Justice capable of serving as a staunch defender of rights secured by the Constitution and laws of the United States. Political realities being what they are, however, I am not so naive as to expect that the next member of the Court will have views identical to those of those two recently-retired justices or be inclined to vote as they might on every issue. But I do think that the American people are entitled to have a man or woman appointed to fill the vacancy left by Justice Marshall who shares the vision of the Supreme Court's role that several of you expressed at the opening session and that most of our fellow citizens embrace.

The Administration would like to persuade us that Judge Clarence Thomas is that person. But I, for one, have seen little in Judge Thomas' government service, writings and speeches, or, indeed, in his testimony during the past week before this Committee to convince me that he would be a champion for those who turn to the Court for protection or that he has the capacity or inclination to make it a kinder and gentler institution than

it is today.

To perform those tasks, a justice has to be have a sense of history. Judge Thomas has urged this committee and the American People to disregard his writings and speeches as philosophical ramblings or forays into political theory and to focus on who and what he is today.<sup>6</sup> I find that very hard to do, however, since I have had almost no personal contact with Judge Thomas. Moreover, I have been unable to glean very much from his opinions on the Court of Appeals for the District of Columbia Circuit since they address largely routine administrative and criminal law issues.

What one finds in Judge Thomas' writings, among other things, is a glaring lack of any historical perspective. He and other "Black Conservatives" have gained some public sympathy in recent years by contending that they have been ostracized by liberal blacks and the "civil rights establishment" Because they had the courage to speak out, to challenge the prevail orthodoxy.

I, for one, welcome challenges to orthodoxy, in civil rights

or elsewhere. But what I have difficulty accepting challenges from people who demonstrate a woeful ignorance of history. Judge Thomas' articles and speeches fall into that category. They certainly have attracted widespread attention in recent years akin to that enjoyed by the perennial "man bites dog" stories. But when Judge Thomas attacks affirmative action, or school desegregation or efforts to ensure minorities a meaningful role in the political process, it is evident that he lacks a basic understanding of the civil rights struggle in America.

One would not gather from reading his articles or speeches, for example, that administrative agencies and courts adopted affirmative action "goals and timetables" as a response to what, in many instances, were years of resistance by employers or unions to the opening up of employment opportunities to minorities and women<sup>7</sup>. My point is not to argue here the wisdom of goals and timetables but rather to make the point that it is difficult to take seriously proposals for change from a person like Judge Thomas who treats a highly complex subject

rhetorically and superficially for want of any sense of historical context.

In several of his articles Judge Thomas offers his own rewriting of the Supreme Court's 1954 opinion in Brown v. Board of Education<sup>8</sup> striking down state-imposed segregation in public educations. He then goes on to argue that had the Court approached the issue of school desegregation his way, the country might not still be engaged in a debate over how to eradicate the vestiges of previously dual systems. His recitation and analysis seem devoid of any sense of the difficult legal campaign waged to overturn the "separate but equal" doctrine<sup>9</sup> And it does not show an awareness of the degree to which school desegregation doctrine after Brown was an understandable response to organized, often massive, resistance to even minimal changes in all-white, all-black assignment patterns for over a quarter century.<sup>10</sup> I make these observations not to suggest that further debate over what we do about segregated education in America in the 1990s is unwarranted or that the old approaches may not need to yield to

new ones. But I seriously doubt that it can be a constructive one on Judge Thomas' terms.

Judge Thomas has also found fault with Congress' and the Supreme Court's efforts to ensure minority voting rights.<sup>11</sup> Yet his criticisms sit unembarrassed on the page by any apparent comprehension of the lives and the limbs that courageous citizens offered up to vicious racists so that the promises of the Fifteenth Amendment might be realized.<sup>12</sup> One searches the pages of his articles for any recognition of how Southern registrars effectively frustrated the Justice Department voting rights enforcement litigation program in the early 1960s.<sup>13</sup> They make no mention of these and other stories of resistance to effective minority exercise of the franchise that caused the Congress to pass the Voting Right of 1965 and to extend its operation by large margins in 1970, 1975 and, most recently, in 1982.<sup>14</sup> Meaningful conversations have been going on for several years among informed blacks, Hispanics, and whites about whether well-established approaches to voting rights issues are any longer in

the best interest of racial minorities or of the society at large.<sup>15</sup> That Judge Thomas was not invited to join can be explained rather simply: he had nothing to bring to the table.

It might be argued that Judge Thomas really is aware of the history I have described but simply decided to avoid any reference to it in his articles for reasons known only to himself. Even if that is true, I am left, nevertheless, with the question of why someone like Judge Thomas would address such important legal and political without giving them the due considerations they clearly deserved.

## II.

Judge Thomas has suggested during his testimony over the past week that the speeches and articles to which I refer were examples of what he did as a member of the Executive Branch, as a political operative, but do not offer any real insights into what he is like as a judge.<sup>16</sup> Strictly speaking, he was that. However, I think that his self-characterization in this respect is revealing. For it lacks a sense of the special role he was

expected to play in the Executive Branch both as an Assistant Secretary for Civil Rights in the Department of Education and as Chairman of the Equal Employment Opportunity Commissions E.E.O.C. As the members of this committee are all well-aware, Congress created the posts Judge Thomas occupied because it felt that issues of discrimination in education and employment deserved the attention of a senior-level official and that protecting the interests of those likely to suffer unfair treatment in those respects should be a full-time rather than part-time endeavor.

Yet Judge Thomas, as Assistant Secretary at the Education Department, argued, for example, against extending the protection of Title IX, which prohibits sex discrimination by educational institutions receiving federal funds to cover employment discrimination against women teachers.<sup>17</sup> His position was rejected by the Assistant Attorney General for Civil Rights and the Solicitor General in the Department of Justice and, ultimately, by a unanimous Supreme Court.<sup>18</sup>

As Chairman of the E.E.O.C., Judge Thomas set his sights on

abolishing the agency's reliance on statistical evidence of employment discrimination, despite the Supreme Court's approval of such proof, because he questioned what he understood to be the basic premise involved. He believed that this evidentiary technique relied on the conviction that workforces should reflect, in the absence of discrimination, the proportion of racial minorities and women in the population at large. He thought that this was absurd and he was right.

His only problem was that the case law he criticized claimed no such thing. It did acknowledge that statistical disparities between groups reasonably alike in overall qualifications for the jobs in question would be some evidence of discrimination. But it also clearly left employers free to introduce evidence supporting a non-discriminatory explanation for such disparities.<sup>19</sup>

Given his misunderstanding of this doctrine, however, Judge Thomas felt unconstrained in praising a book critical of statistical claims about sex discrimination as "a much needed

antidote for cliches about women's earnings and professional status."<sup>20</sup> He stated elsewhere on this same point:

It could be . . . that blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks choose not to study chemical engineering and the women choose to have babies instead of going on to medical school.<sup>21</sup>

In sum, Judge Thomas was of the view that minority and female plaintiffs, despite the well-established fact of race and sex discrimination, should bear the burden of negating every other explanation for employment disparities in order to prevail.

Moreover, Judge Thomas' frequent expressions of disagreement with Supreme Court decisions in the employment and affirmative action fields undoubtedly had a destabilizing impact upon the E.E.O.C.'s enforcement program. He even went so far as to commend publicly the dissent in an affirmative action case as "guidance for lower courts and a possible majority in future decisions."<sup>22</sup> Of course, government employees like Judge

Thomas do not forsake their First Amendment rights to speak out on important issues of the day. However, his commentaries on Supreme Court doctrine, one day expressing E.E.O.C. policy, the next his own personal views, must have been difficult for the agency's several thousand employees spread across the country to comprehend readily.

Overall, Judge Thomas' record as a civil rights enforcer in the Reagan and Bush administrations seems more the subject of lengthy explanations and apologies, as in the case of the thousands of lapsed age discrimination claims, rather than the object of general praise for jobs well done. And, for all his talk<sup>23</sup> about the need for stronger sanctions in employment discrimination cases, there is no evidence that he took systematic steps to persuade Congress to provide them.<sup>24</sup> The strong picture that emerges suggests that Judge Thomas had his opportunity to guard the rights of people who looked to his agencies to help them and he did not measure up to the task.

. Judge Thomas' and the Administration's response to these disquieting features of his world view and civil rights enforcement record is that his humble beginnings are an assurance that he will be quick to rise to the defense of those looking to the Supreme Court to vindicate their rights. In my estimation, Judge Thomas' impressive story of his journey from poverty to prominence is not assurance enough.

## END NOTES

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2. Hearings, Sept. 10, 1991, at 37 (remarks of Sen. Leahy).
3. Hearings, Sept. 10, 1991, at 65 (remarks of Sen. Heflin).
4. Hearings, Sept. 10, 1991, at 78 (remarks of Sen. Simon).
5. Hearings, Sept. 10, 1991, at 87 (remarks of Sen. Kohl).
6. Hearings, Sept. 12, 1991, at 17-18 (colloquy between Judge Thomas and Sen. Kohl).
7. Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years 391, 395-96. (David Boaz ed. 1988)
8. Clarence Thomas, Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation, 30 How. L.J. 691, 699-703 (1987).
9. Richard Kluger, Simple Justice (1975).
10. Griffin v. County School Bd., 377 U.S. 218 (1964).
11. Clarence Thomas, Speech at the Tocqueville Forum, Wake Forest Univ. 8, 17 (Apr. 18, 1988).
12. David Garrow, Protest at Selma (1978).

13. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)
14. Laughlin McDonald, The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance, 51 *Tenn. L. Rev.* 1 (1983).
15. Lani Guinier, the Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 *Mich. L. Rev.* 1077 (1991).
16. Hearings, Sept. 13, 1991, at 17 (testimony of Judge Thomas).
17. Peter Brown, UPI (July 13, 1981); BNA Daily Labor Report at A-5 (Aug. 5, 1981) reprinting Terrel Bell letter of July 27, 1981).
18. *North Haven v. Bell*, 456 U.S. 512 (1982).
19. *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).
20. Clarence Thomas, Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom, *Lincoln Rev.*, Winter 1988, at 15.
21. Juan Williams, A Question of Fairness, *Atlantic Monthly*, 1987, at 10 (NEXIS pagination).
22. Clarence Thomas, Speech to the Cato Institute 20-21 (Apr. 23, 1987).
23. Clarence Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough! 5 *Yale L. & Pol. Rev.* 401, 408-411, (1987).
24. Hearings, Sept. 13, 1991, at 49-50 (testimony of Judge Thomas).

Senator KENNEDY. Thank you very much.  
Professor Edley.

### TESTIMONY OF CHRISTOPHER EDLEY, JR.

Mr. EDLEY. Thank you, Mr. Chairman.

In summary, my central point is this: The Constitution forces the executive and legislative branches to share responsibility for picking Justices, and thereby share influence over the course of constitutional history.

In taking the measure of the nominee, you should look to the whole record and recognize that good character and unimpeached integrity did not prevent *Dred Scott* or *Plessy* or *Lochner*.

In the final analysis, it is not the character of this man that must be at issue, but the character of his record. Yet the heart of the administration's affirmative case is Judge Thomas' personal story and character, in hopes, perhaps, that this strategy will undergird his credibility and present an image strikingly more attractive than the piles of speeches and abstractions.

But that voluminous record raises many grave concerns to which the nominee offers one of three responses:

First, "Although what I said may sound extreme, I was really trying to make a far less controversial point." But repeated so often, this seems to me to lack credibility.

Second, "That was the position I took as a policy official in the executive branch; as a judge, I do not make policy." This argument is wrong. It misconceives the role of the Supreme Court and the process of judging.

Third, "I have an open mind on that subject." When applied to fundamental matters, however, this is almost disqualifying. A well-qualified nominee should at least be able to suggest, however tentatively, the framework for his or her analysis. How else can you discern someone's constitutional vision, which is the key question before you?

You have his documents to analyze, and you have his credibility to assess. But here is what I believe you are left with in two of the more critical dimensions: Civil rights and separation of powers.

First, in civil rights, the close questioning—particularly by Senator Specter—did not demonstrate that the nominee's views fall within the broad bipartisan consensus. If Judge Thomas joins the Court—this Court that gutted *Griggs* in a fit of activism—what grounds are there for confidence that he will dissent from further judicial activism of the same sort—judicial activism to reverse those statutory and constitutional holdings he attacked so forcefully for so many years?

The second critical dimension is broader. Judge Thomas on his record—on his record—is certainly an unlikely congressional pick for referee or partner in the separation of powers structure.

Why so? Well, the pattern of intemperate remarks—Senator Metzbaum replayed some of them yesterday—the repeated clashes with oversight committees, the cramped and even distorted reading of title VII and of judicial precedents—Senators Specter and Kennedy explored these—the pattern, it seems to me, is compelling.

The fair prediction, I believe, is that Justice Thomas would tilt strongly toward the executive, defer to narrow agency interpretations of statutes, lean against generous interpretations of regulatory laws, including civil rights measures, and probably be uncharitable in appraising the rationality of statutes within the framework of due process or section 5.

The Court's referee role, however, is more critical now than ever. We seem ever more ambitious as a people about what we want to accomplish collectively, through one or another level of government. And divided government—that is to say, the White House and Congress led by different political parties—spawns conflicts which courts must often resolve. These separation of powers tensions are implicit almost everywhere, but statutory interpretation, with an agency arguably hostile to congressional will, is the most common setting.

Let me be plain. When you choose to confirm or reject a nominee, you influence the Supreme Court's jurisprudential view of statutory interpretation and the role of the executive. You influence, perhaps profoundly, the balance of power.

*Rust v. Sullivan*, the abortion gag-rule case, shows the danger of a world where, even if Congress has passed the law, executive agencies can distort it, the Supreme Court can misinterpret it, and when Congress tries to clarify its own intent, the President can veto it.

The design of the Framers seeks to balance factions and ensure that no branch has ideological domination over the others. With that in mind, Mr. Chairman, the lax and deferential standard for confirmation proposed by some makes little sense. Can it be now that the greatest danger to the separation of powers is not the abuse of executive power or an overreaching judiciary, but the unwillingness of Congress—in this instance, the Senate—to wield its power?

If there is a new Thomas standard, it will be by your choice. You will be choosing evasion over candor, conversion over consistency, political scripts over constitutional debate. But I believe you will choose well.

I hope this has been helpful.

[The prepared statement of Mr. Edley follows:]

## ORAL STATEMENT

Professor Christopher Edley, Jr.  
Harvard Law School

before the

Senate Committee on the Judiciary

Hearings on the Nomination of Judge Clarence Thomas  
to be Associate Justice of the Supreme Court

September 17, 1991

Thank you Mr. Chairman.

In summary, my central point is this: The Constitution forces the executive and legislative branches to share responsibility for picking justices, and thereby share influence over the course of Constitutional history.

In taking the measure of the nominee, you should look to the whole record, and recognize that good character and unimpeached integrity did not prevent *Dred Scott*, or *Plessy*, or *Lochner*.

In the final analysis, it is not the character of this man that must be at issue, but the character of his record. Yet the heart of the Administration's affirmative case is Judge Thomas' personal story and character, in hopes, perhaps, that this strategy will undergird his credibility and present an image strikingly more attractive than the piles of speeches and abstractions.

But that voluminous written record raises many grave concerns, to which the nominee offers one of three responses:

- First: "Although what I said may sound extreme, I was really trying to make a far less controversial point." Repeated so often, this lacks credibility.

- Second: "That was the position I took as a policy official in the executive branch; as a judge, I do not make policy." This argument is wrong, misconceiving the role of the Supreme Court and the process of judging.
- Third: "I have an open mind on that subject." When applied to fundamental matters, this is almost *disqualifying*. A well-qualified nominee should at least be able to suggest, however tentatively, the framework for his or her analysis. How else can you discern someone's constitutional vision--the key question before you?

You have his documents to analyze, and you have his credibility to assess. But here is what I believe you are left with in two of the more critical dimensions: civil rights and the separation of powers.

First, in civil rights, the close questioning did not demonstrate that the nominee's views fall within the broad bipartisan consensus. If Judge Thomas joins the Court that gutted *Griggs* in a fit of activism, what grounds are there for confidence that he will dissent from further judicial activism of the same sort--judicial activism to reverse those statutory and constitutional holdings he attacked so forcefully over the years?

The second critical dimension is broader. Judge Thomas, on his record, is certainly an unlikely *Congressional* pick for referee or partner in the separation of powers structure.

Why so? The pattern of intemperate remarks (Senator Metzenbaum replayed some of them), the repeated clashes with oversight committees, the cramped and even distorted reading of Title VII and of judicial precedents (Senators Specter and Kennedy explored these)--the pattern is compelling.

The fair prediction, I believe, is that Justice Thomas would tilt strongly toward the executive, defer to narrow agency interpretations of statutes, lean against generous interpretations of regulatory laws (including civil rights measures), and probably be uncharitable in appraising the rationality of statutes challenged under the due process clause or under section 5.

The Court's referee role is more critical than ever. We seem ever more ambitious about what we want to accomplish collectively, through one or another level of government. And

p.2

divided government--White House and Congress led by different political parties--spawns conflicts, which the courts often must resolve. These separation of powers tensions are implicit almost everywhere, but statutory interpretation, with an agency arguably hostile to congressional will, is the most common setting.

Let me be plain. When you choose to confirm or reject a nominee you influence the Supreme Court's jurisprudential view of statutory interpretation and the role of the executive. You influence, perhaps profoundly, the balance of power.

You must guess whether the man who sat before you has the same philosophy of governance as the man who served two presidents, who was insensed about oversight, who praised Colonel North's performance, and who attacked the Chief Justice's opinion in *Morrison v. Olson*.

If the philosophy of governance that prevails in these halls differs from that prevailing on the High Court, then you in the Congress must prepare for a protracted guerrilla war over interpretation of your legislation--a war you are ill-suited to fight.

*Rust v. Sullivan*, the abortion gag-rule case, shows the danger of a world where, even if Congress has passed the law, executive agencies can distort it, the Supreme Court can misinterpret it, and when Congress tries to clarify it's own intent, the President can veto it.

We have seen the same thing in civil rights, again and again.

How many more examples will there be, Mr. Chairman? You are not powerless in this. The *opportunity and power* to shape our Constitutional history are not the President's alone.

The design of the Framers seeks to balance factions and ensure that no branch has ideological domination over the others. With that in mind, the lax and deferential standard for confirmation proposed by some makes little sense. Can it be that the greatest danger to the Separation of Powers is not the abuse of executive power, or an overreaching judiciary, but the unwillingness of the Congress--in this instance the Senate--to wield its power?

And your power includes this confirmation process. It is not for the nominee or the White House to design. Mr. Chairman, *this Committee* will decide whether there is to be, as you put it, a "Thomas standard." You will choose whether to reward a process that favors evasion over candor,

conversion over consistency, platitudes over analysis, political scripts over constitutional debate, and selective memory over substantive command.

I believe you will choose well. I hope this has been helpful.

Senator KENNEDY. Professor Lawrence.

### TESTIMONY OF CHARLES LAWRENCE

Mr. LAWRENCE. Mr. Chairman, Senators, it is with considerable anguish that I come before this committee to oppose the confirmation of Judge Clarence Thomas. No one who has himself experienced the headwinds of American racism can easily oppose an individual who has traveled the same buffeted road. No one who has been participant and witness to the courageous struggles that have opened doors so long closed to us is anxious to say that one of our own should not pass through those doors. But after a long and careful consideration of Judge Thomas' record as a public official, after listening to his testimony before this committee, I find that I must oppose him.

When Judge Thomas made his opening statement before this committee, he invoked the legacy of Justice Thurgood Marshall. He said, "Justice Marshall, whose seat I have been nominated to fill, is one of those who had the courage, the intellect \* \* \* to knock down barriers that seemed so insurmountable." When I heard that invocation, I wished with all my heart that this was a man capable of fulfilling that legacy. I wanted to believe that he knew what it meant to stand on the shoulders of this great champion of racial justice, that he was an individual with the acuity of intellect, the integrity and the strength of character to carry on the monumental vocation that was Justice Marshall's. I knew that millions of black Americans shared this longing with me.

Justice Marshall was our first and only voice on the Nation's highest Court. In the judicial conference room, on the pages of the Supreme Court reports, and in the public discourse, we counted on him to make our story heard. On a Court increasingly insensitive to the plight of those denied the full fruits of citizenship, he was also a voice for women, for gays and lesbians, for the poor, and for other minorities. This is Justice Marshall's legacy. And those of us who believe in the Court's special role as guardian of those without voice, must do more than hope and trust in Judge Thomas' invocation of that legacy.

Judge Thomas has told us of his humble beginnings, of his own experience with the humiliation of segregation and racial denigration. He has assured us that he will not forget those beginnings, those experiences of shame. I am certain that he will not. But we must ask another question: What has Clarence Thomas done with this experience?

By what path has he come from those humble beginnings to the threshold of the Supreme Court? What does the record of his life, and particularly his record as a public servant, tell us about his values and character, about whether he can be counted on to be a voice for those who have not been so fortunate as he?

Thurgood Marshall chose the path of leadership within his own community, of legal advocacy on behalf of those who were least powerful, of constant challenge to the institutions and politicians who exploited race and poverty. His way was to speak truth to power.

Judge Thomas has come to this crossroad by a very different route. His choice was to serve those who are most powerful in this society, and he has served them well.

The President has nominated Judge Thomas to the Supreme Court precisely because he has proven his willingness to advance the ideology of his patrons, without dissent. He has demonstrated his loyalty as an administration footsoldier. He has been an eager spokesperson for the agenda of the radical right.

One cannot help but wonder what this history of accommodation has done to Clarence Thomas' character. In always striving to please those who have been his benefactors, has he lost himself? It is somehow not surprising in the course of these hearings that we have heard him disavow so much of what he has said before.

This is a political nomination, let there be no mistake about that. The Framers anticipated this inevitability and gave to the Senate the job of checking the President's power to make a Supreme Court in his own image. This President is determined to do just that, to push the Court even more solidly to the ideological right than it already is. When this is so, it is the especially important role of the Senate not to shirk its responsibilities in this process. It is your duty to insure that there remains on the Court some meaningful diversity of judicial philosophy and political orientation, that there remains some voice for those who too often go unheard.

It is your duty to reject this nomination and reject each nomination that follows, until you are assured that this new Justice will stand against the current Court's assault on *Roe v. Wade*, *Brown v. Board of Education*, and *Griggs v. Duke Power*. It is not enough to guess, to hope, or even to pray, as I have, that, if confirmed, Judge Thomas will grow and change. It is your responsibility to insure the American public that the legacy of Justice Marshall will live on.

Thank you, Senator.

[Prepared statement follows:]

**Statement of**  
**Professor Charles Lawrence**  
**before the**  
**Senate Committee on the Judiciary**  
**Hearings on the Nomination of Judge Clarence Thomas**  
**to be Associate Justice of the Supreme Court**  
**September 17, 1991**

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Judge Thomas has told us of his humble beginnings, of his own experience with the humiliation of segregation and racial denigration. He has assured us that he will not forget those beginnings, those experiences of shame. I am certain that he will not. But we must ask another question: What has Clarence Thomas done with this experience? By what path has he come from those humble beginnings to the threshold of the Supreme Court? What does the record of his life, and particularly his record as a public servant, tell us about his values and character, about whether he can be counted on to be a voice for those who have not been so fortunate as he.

Thurgood Marshall chose the path of leadership within his own community, of legal advocacy on behalf of those who were least powerful, of constant challenge to the institutions and politicians who exploited race and poverty. His way was to speak truth to power. Judge Thomas has come to this crossroad by a very different route. His choice was to serve those who are most powerful in this society and he has served them well. The President has nominated Judge Thomas to the Supreme Court precisely because he has proven his willingness to advance the ideology of his patrons without dissent. He has demonstrated his loyalty as an administration footsoldier. He has been an eager spokesperson for the agenda of the radical right. One cannot help but wonder what this history of accommodation has done to Clarence Thomas's character. In always striving to please those who have been his benefactors, has he lost himself? It is somehow not surprising that we have heard him, in the course of these hearings, disavow so much of what he has said before.

This is a political nomination. Let there be no mistake about that. The framers anticipated this inevitability and gave to the Senate the job of checking the president's power to make a Supreme Court in his own image. This president is determined to do just that; to push the Court even more solidly to the ideological right than it already is. When this is so, it is especially important that the Senate not shirk its responsibility in the process. It is your duty to insure that there remains on the Court some meaningful diversity of judicial philosophy and political orientation, that there remains some voice for those whose voices too often go unheard.

It is your duty to reject this nomination and reject each nominee that follows until you are assured that this new Justice will stand against the current Court's assault on Roe v. Wade, Brown v. Board of Education, and Griggs v. Duke Power. It is not enough to guess, to hope, or even to pray, as I have, that if confirmed, Judge Thomas will grow and change. It is your responsibility to insure the American People that the legacy of Justice Marshall will live on.

Senator KENNEDY. Thank you very much.

We will follow a 10-minute rule for the questions. Some people argue that, despite Judge Thomas' record of hostility on civil rights, we should trust that if he is confirmed to the Supreme Court, he will be sensitive on civil rights. Given both his past record, statements, position, actions, and statements before the committee, what kind of weight should we give that kind of advice or guidance, Professor Days?

Mr. DAYS. The concerns that I expressed, Senator Kennedy, the administration and Judge Thomas have suggested that his humble beginnings will cause him to rise to the defense of those who are most in need of protection, but it seems to me that, given his world view and the examples that I just described, his impressive story of his journey from poverty to prominence is not assurance enough.

What strikes me about his discussion of the world is that there seem to be two periods in his life, his early experiences in Savannah and today, and there seems to be very little recognition of what had gone on between that. And when he talks about discrimination, he talks about his own experience. He rarely talks about the little people out in the street who are struggling to get jobs, trying to get their children into decent schools, trying to get an effective way to participate in the political process.

So, I do not think the record causes us any assurance that, when he gets into the Supreme Court, if he gets into the Supreme Court, he will do what is required of him.

One of the things that I think is important about the role, as Professor Lawrence indicated, about Justice Marshall and Justice Brennan, was that they represented those who are at the margins of the society not only in their opinions and not only in their dissents, but I am confident that in conferences, in the formal and informal discussions within the Court, they helped educate some of their colleagues to what was going on on the streets, what was happening down below the level that they perhaps had ever experienced in their own lives, and I do not have any confidence, given what I have read of Judge Thomas' writings and what I have heard him say in these hearings, that he can play that role or is willing to play that role.

I am sure that the other Justices will know about his life in Pin Point, GA, but whether they know about the lives of those kids in Savannah who were struggling to get a decent education is as big question.

Senator KENNEDY. Mr. Edley, Mr. Lawrence.

Mr. EDLEY. The only thing I would add, Senator, is that it seems to me it is just simply too romantic. I would like to believe in the possibility of redemption, but I would like some evidence. It seems to me it is too much to play Russian roulette with our rights or with the role of the Congress, the critical issues that I think are at stake here.

The background determinism that is suggested by the fact that he came from Pin Point and, therefore, will act in a special way on the Court seems to be counter-factual. That is not what the record demonstrates. What the record demonstrates is that, despite the diversity suggested by his experience, what has he made of that experience? And what he has made of that experience, it seems to me,

is harshly judgmental, and that is not the kind of representation certainly that I believe the Supreme Court needs.

Mr. LAWRENCE. I would only add, Senator Kennedy, that, to my mind, we must hold him responsible for the choices that he makes in his adult life, as I indicated, what he has done with this experience, and it seems to me quite clear from his record that those choices have been choices that would not lead us to believe that he would be sensitive to these very things that might have been so important an influence on him.

I think the other thing that I would be concerned about is that he has been so unforthcoming in these hearings, in his discussion of the particulars of his judicial philosophy and what that philosophy might be, that if this committee has any uncertainty as to whether his record or his beginnings really influence his life, in order to assure us of his direction, that we must require that he be considerably more forthcoming on the particulars of his judicial philosophy than he has been willing to be.

Senator KENNEDY. Let me ask also the panel, as we obviously have got limited time, about what our country would have looked like, if Judge Thomas' view had been the prevailing view in the Supreme Court, say, for the last 20 years.

Perhaps, Mr. Days, because, unfortunately, I know that light is going to go on, if you can also perhaps in your response try and help me to understand the distinction which Judge Thomas placed upon diversity for women, the *Santa Clara* case, diversity for women in the workplace, versus diversity at the university, which you are currently associated with at Yale, what that distinction is that he mentioned and how important, serious is it.

Finally, on the voting rights cases, you are familiar with his general criticisms of voting rights cases, this has been an area of particular interest, I know, to you and to the panel. I have difficulty in understanding the nature of the criticism, given both the Supreme Court holdings and the legislative action.

I think I have probably given you an awful on that, but, first of all, what the country would have looked like, if his view had been the prevailing view, generally, and then specifically, if you would address those two subquestions.

Mr. DAYS. Senator Kennedy, it gets back to my initial point. Over the last 20 years, the Supreme Court has demonstrated its greatness, it seems to me, when it understood the realities outside of the marble walls of the Supreme Court, when it understood that real people were going to be affected by its decisions and did not let labels, as such, blind them to the fact that there needed to be pragmatic and effective remedies to discrimination and exclusion.

I think that if Judge Thomas' approach had been the prevailing one during this period, we would have been left with slogans and with very superficial catch lines and buzz words to describe very complex situations.

For example, in school desegregation, the Supreme Court was not responding to an abstraction, when it voted in *Green v. New Kent County*, to require school boards to do more than just sit on their hands, when they had been involved in years, decades of intentional segregation. That was as pragmatic response, it was responsive to the realities.

Now, with respect to Judge Thomas' distinctions, I have to admit, Senator, that I have tried very hard to understand those distinctions and they continue to elude me, as well.

Yale Law School has had an affirmative action program for a number of years, and the idea is, given the fact that in this country there has been a systematic exclusion of minorities and women from legal education and other types of higher education, it was necessary for institutions to reach out and find qualified individuals and bring them in, because doing it by the numbers, putting them through a computer would not produce that result.

I think the situation is the same, when we talk about *Santa Clara County* and the *Johnson* case. Over 250 men were employed in that agency, and no woman had ever had a supervisor job. For us to think only in terms of the individual and not see that institutional context, it seems to me is to miss the reality that the law ought to respond to.

I think that Justice O'Connor was correct, when she talked about Justice Scalia's appearing to write on a clean slate in dealing with these issues. I think that is Judge Thomas' inclination, to write on clean slates, with no history, with no background, with no reality to guide his responses.

Now, with respect to the Voting Rights Act, he apparently agrees with all of the decisions that have been mentioned to him in these hearings, although he made a categorical statement of opposition to what was happening in the voting rights area.

He did say he was opposed to the effects test. I do not know exactly what he means by that, but you know, Senator Kennedy, that the Congress struggled with that issue and arrived at the position that, given the continuation of very deeply imbedded evidence of discrimination and vestiges of discrimination, it was necessary to provide some trigger to identify where minorities probably would continue to be excluded from the political process, and that was necessary in 1982, and I would expect that the Congress will look again to determine whether new responses are necessary to respond to new problems. I do not see Judge Thomas doing that.

Mr. LAWRENCE. I would add to this, Senator Kennedy, in response to the first part of your question, what would this look like, I recall being here in Washington for the argument of the *Bakke* case, that Professor Cox began his oral argument by pointing out that if the Supreme Court were to decide that voluntary affirmative action were improper on behalf of universities, that we would return to a time when our campuses were lily white, and I think that one of the changes might have been that Clarence Thomas would not have been at the Yale Law School, were his policies implemented by the Supreme Court at an earlier time.

The other thing that I want to point out that troubles me about the distinction between the education cases and the employment cases is that those of us who have litigated employment cases on the front line know that these cases, that even the voluntary programs are in response to deeply imbedded discriminatory practices and attitudes, that are not attitudes that people state purposely, but are, nonetheless, deeply imbedded in the attitudes in the institutions.

It seems to me that, if anything, as important as it is to integrate our educational institutions, that it is the working people, that it is the kind of people that Senator Specter and Senator Heflin and other people have questioned how—what is it about this young man who drops out of school or the young woman who drops out of school in the 10th grade, that is the person who needs to be integrated into our workforce.

To my mind, if anything, it is more important to apply these principles in the employment cases, at the entry level of employment and promotion and employment, than it is, even as important as it is in education.

Mr. EDLEY. May I make two very brief points, Mr. Chairman? The two points are this: In these areas that we have just been talking about, I believe that Judge Thomas stands quite some distance from the mainstream on civil rights. And the second point is that I believe he stands quite some distance specifically from Congress and a willingness to embrace congressional intent.

For example, I combed the transcripts as best I could, particularly the colloquies with Senator Specter, and I could not find any reassurance on the question on his interpretation of title VII. As far as I can tell, he believes that title VII requires race neutrality. He believed that that ought to be the law, while recognizing that the courts have held otherwise.

But there is nothing to suggest from the transcripts that I have been able to find that he doesn't still believe that title VII ought to be interpreted so as to require race neutrality, certainly in the voluntary context and perhaps at least in substantial areas of the remedial context.

He has the same attitude, as far as I can tell, with respect to the 14th amendment. A constitutional ruling from a Justice Thomas could not be reversed, no matter how many times you passed a civil rights restoration act.

So it seems to me that in terms of his distance from the mainstream and his continuing and repeated resistance to the most reasonable interpretation of congressional will, Judge Thomas simply doesn't deserve confirmation.

Senator KENNEDY. Senator Thurmond.

Senator THURMOND. Mr. Chairman, I understood from Senator Biden we were going to limit the witnesses to 5 minutes. Now, I don't want to complain, but these witnesses have all gone over 5 minutes. And I understood further from Senator Biden you are going to cut the committee members from 10 to 5 minutes. Is that your understanding?

Senator KENNEDY. The witnesses for 5 minutes and the questioning for 10.

Senator THURMOND. Senator Biden didn't change the 10 to 5?

Senator KENNEDY. That is my understanding, and I want to say that they have been responsive to questions. No one is interested in delaying this hearing. And if there is some, then I will be glad to take another round.

Senator THURMOND. Well, I understand we have about 85 witnesses to hear. Now, is it going to be the intent just to carry this hearing on and on, or bring it to a conclusion?

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-

American who is conservative and an African-American who is black. One of the difficulties is that there ought to be more people with the kind of credentials which you men and Judge Thomas have as part of the Government, part of the pool for selection for the Supreme Court, and I say this in a context that struck me right after I graduated from law school and joined a big law firm in Philadelphia. I saw the commitment of all the brains and talent to the profession, where there was money and there was prestige and there was an unwillingness to be a committee man or to be an assistant district attorney and to work up in the political ranks.

So, this is not a bad place to say that Government needs the kind of talent which Judge Thomas and you men bring, but into the political arena, because that is where appointments are made.

Professor Lawrence, now for the question after the comment: You criticized Judge Thomas for being on the radical right, and he opposes class preferences, because—and this appears in a *Yale Review*—he says they are bad for the beneficiaries, class preferences, because it tells them that they are in need of handouts, it tells them they are disabled and it is an affront to their dignity, and it is bad for individuals displaced, because they are displaced by a preference which is not based on merit and it increases racial divisiveness and is bad for the country.

Now, aside from whether you agree with that—and I think those are pretty strong arguments—can you say, Professor Lawrence, that they do not have at least sufficient merit for a reasonable man like Judge Thomas to hold them?

Mr. LAWRENCE. I think that the arguments that you have made in your quote, that you noted that Judge Thomas has made, are reasonable arguments, that they have merit. I think that if you were to give me time, I would have responses to each of those arguments which also have a great deal of merit, which I might think have more merit, but I think that those are not the kinds of things I was referring to when I said that Judge Thomas, among this group of African-Americans who have come to the Government, even African-Americans who are Republicans, that I think Judge Thomas in many of his other statements has been considerably further from the mainstream than many of these other individuals.

I think that the particular quote that you give to me is a quote which reasonable persons have indicated and believe in. I would differ with their interpretation of where to put the weight on those things about where the divisiveness really comes from, whether it comes from the programs themselves or the way those programs are used by certain people to divide people, about whether one necessarily feels that one is inferior because one is given support that other people are not given. Certainly, I do not find the officers of the savings and loans feeling inferior, because Congress has supported their activities.

I think I could respond to those, but the activities I was referring to were the activities and the ideas with respect to natural law, were the condemnation of mainstream Supreme Court opinions, such as *Griggs* and *Swan*, were the support of dissenting opinions by Justice Scalia. I think these are indications of an adherence to a judicial philosophy, to a political philosophy that is considerably to

the right of even African-Americans, other African-Americans who have done their yeoman's work within the Republican Party.

Senator SPECTER. Well, I am going to take that as a qualified yes. A reasonable man could hold the views which he articulated, and I am not saying that there are not arguments on the other side.

It has been a regret of mine in these hearings that so much time has been spent on repeating the same questions and talking about natural law, which was a fraction, a tiny part of what he had to say, really only on the Declaration of Independence as an answer to slavery, and a little bit on economics. The area where he had so much to contribute was on affirmative action, and we touched on it almost not at all.

But I have cited his statements and I think that they are very reasonable, and I think it is very healthy to put these forward in our society. Speaking for myself, and I am not making a commitment here, I do not put them in the radical right.

Professor Edley, let me take up a question with you, and then I have one question for Professor Days. You say, Professor Edley, that he does not have a background and character with a sufficient constitutional vision, and you say that it is not the character of the man, but it is the character of the record.

I would respectfully—I will not say I disagree, let us just discuss it for a minute.

Mr. EDLEY. You don't have to ask me a question, Senator, if you do not—

Senator SPECTER. I know I don't have to. I have a right to remain silent, and so forth, but I have a very serious question to ask. I hope all of my questions are serious.

We have had a nominee who has come forward here who perhaps, as a hypothesis, has campaigned for the Supreme Court. Professor Kurland came forward in one of our confirmation hearings, I forget which one it was, and said that the nominee had gone from podium to podium campaigning for the Supreme Court, and I asked him if there was anything wrong with that. Some of the people on this side of the table do that all the time.

You have a man who put in his writings, Judge Thomas has, in order to be within the Republican Party, a litmus test was to be against affirmative action and against welfare, a lot of questions we did not have a chance to ask him. I would suggest to you that his character is shown more by his roots than by these writings, and even in these writings, in 1983 he favored flexible goals and timetables, and in 1988 he opposed them.

Why not rely upon the character, which I think came through very positively for Clarence Thomas here? I do not think his writings did, his writings were inconsistent with what he said, problem- some, but his character was undeniably strong and laudable. Why not rely on the character, which had been with Judge Thomas a lot longer than those writings?

Mr. EDLEY. At the risk of repeating myself, and I hope this will be responsive, character is not irrelevant, by any means. What I am urging, however, is that character, the determination that the nominee has good character, high integrity, is not a substitute for discerning the nominee's constitutional vision.

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.

Mr. LAWRENCE. I think that I certainly would feel that it would be a tragedy if President Bush, because we found his first African-American nominee wanted, would not choose from among a wealth of other African-American nominees who we would find to be quite ready to support, even from his own party. So I think that would be a tragedy if this were used in this way.

At the same time, I also feel that, as retired Justice Thurgood Marshall admonished us upon his retirement, the important issue here is not the color of the nominee's skin in terms of a voice for our community, but the nature of that voice. So that, for me, I think that certainly I would hope that the President would find another nominee from within the African-American community, and there are many, many who I feel are extensively more experienced, extensively more qualified than Judge Thomas.

At the same time, I feel that if I am given the choice of a person who shares with me only the color of my skin and a person who will speak for the interest of my community, I will choose the latter.

Mr. EDLEY. I would paraphrase some responses to this that were given in a report issued by the Congressional Black Caucus Foundation recently. Diversity is important, and we do value the goal of having an African-American on the Court; but we do not value it above all else, and we don't value it above some of the principles that we have been discussing on this panel.

It seems to me that the choice is not properly understood as take this conservative black or a white conservative. It seems to me the choice is between taking this very conservative black now or waiting for another African-American or other minority of more mainstream views, if not appointed by Mr. Bush then appointed by the next President.

I think on the scale of decades in which the Supreme Court operates, we are willing to be patient still.

Senator KENNEDY. Dr. Days.

Mr. DAYS. Senator Kennedy, as I indicated at the outset, this has been a very difficult situation for, I think, most African-Americans and most people of good will in this country, because it would give me great pride to see another African-American sit on the Supreme Court; but to follow my colleagues on this panel, I want to see something below the skin, beneath the skin that convinces me that that person will be a voice and a vote for the people who are voiceless and voteless on the Supreme Court, particularly during this time on issues that are of critical importance to all of us and issues that will affect us for as long as certainly the people on this panel will be alive.

Senator KENNEDY. Thank you very much.

Senator SPECTER, I see we have been joined by Senator Simpson. I would be glad to recognize Senator Simpson, and then I think Senator SPECTER had a short—

Senator SIMPSON. Mr. Chairman, I thank you. I think I will defer to Senator SPECTER. He was here prior to my entrance, and I thank you for your courtesy.

Senator KENNEDY. Senator SPECTER.

Senator SPECTER. Thank you, Mr. Chairman.

Professor Days, you said that Judge Thomas had asked naive questions. Were you referring to his pushing the penalties and the jail sentences on that?

Mr. DAYS. Yes. Among other things. I am not talking about that specifically, but certainly I could tell you why I think that has not been effective.

Senator SPECTER. Well, you had mentioned that in the context of the naive questions, and it seems to me that the penalties and jail sentences are a good idea. And when you say he hadn't suggested them to Congress, I don't know about that. We did know about them. He had written about them, and he testified that in the *Local 28 Union* case he had asked the solicitor to ask for contempt penalties in that case, so that he had moved forward in that direction.

Before you said that, I had planned on the first round to ask you a question which ties in with what you have just said. He has been known to rely upon prestigious authority for his positions against affirmative action because he quoted you. And that was what I had—

Mr. DAYS. Out of context, Senator.

Senator SPECTER. Excuse me?

Mr. DAYS. Out of context.

Senator SPECTER. Well, let's see about that. You don't know which quote I am going to pick. I have got two here. I could go either way.

Well, he quotes you in a quote, so let's see if it is out of context. One of the additional reasons—and when I talked to Professor Lawrence, I didn't by any means cite them all as to his reasons on affirmative action. And, again, I repeat, I think it is a great shame we didn't spend some real time on this question because that is his real area of expertise. And I think that is the real cutting edge of this issue in American civil rights on giving people a chance to get a job. If there is one question which deals with all of the problems in the African-American community, drugs, crime, and housing and advancement, it is jobs. And we have neglected it, and neglected it badly.

But this is one of the additional reasons that he advanced on the subject of his opposition to affirmative action. In the Yale Law and Policy Review, he says, "Moreover, the approval of goals and timetables allows yet-undetected discriminators to create a numerical smokescreen for their past or present violations." Then he quotes in a footnote, "Professor Drew Days III, Assistant U.S. Attorney for Civil Rights during the Carter administration, believes that the affirmative action plan in *United Steelworkers v. Weber* was adopted by Kaiser Aluminum and Chemical Corp., at least in part to"—and then he quotes you—purports to quote you—"divert attention from the fact that it had long been engaged in discriminatory employment practices that violated Federal law." He cites a Yale Law Journal article of yours.

My first question to you—well, let's deal with the substance of it. Do you think that that is a valid argument that discriminators do divert attention away from their prior bad conduct by adopting affirmative action plans, which is the argument Judge Thomas makes?

Mr. DAYS. I don't think that that is a common situation. I was talking about a specific case, the *Weber* case, where I felt—indeed, argued as part of the Carter administration in that case that there was evidence of intentional discrimination and we should be careful not to let employers put forward affirmative action plans to hide more deep-seated discrimination and come up with remedies for that discrimination. So it wasn't either/or. My whole article is about tailored responses to situations of discrimination. And there may be some situations where it is necessary to have very hard numbers as a remedy; in others it may be recruitment, it may be spreading the word.

So I really think that that quotation was taken out of context, and that is why I said what I said. I don't think that it is a widespread practice of employers to use affirmative action plans to hide their intentional discrimination. I think what they are doing, with the encouragement of this Congress and, in the past, administrative agencies, is trying to deal with their own discrimination before the sheriff knocks on the door. And I think that is a commendable thing. But I think that they should respond to their history of discrimination and exclusion in a way that is tailored to their particular circumstances.

Senator SPECTER. Well, he doesn't say that you said it was a widespread practice. What he says you said was that it diverts attention from the fact that they had been long engaged in discriminatory employment practices that violated Federal law.

Mr. DAYS. Let me give you one example of how that is dealt with, Senator. There is something called the four-fifths rule that you are probably familiar with in employment discrimination. It suggests that if an employer has, let's say, minority or female employment that is 80 percent of what it should be in that particular work force, then Federal enforcement agencies may not go after that particular employer. But it is made very clear in the uniform guidelines that apparently Judge Thomas didn't like very well that the law does not protect employers who simply go by the numbers; that an individual who is excluded as a result of this approach has a right to go into court and get a remedy. And in other administrations, the Government has supported that type of effort.

So I think that to the extent that employers do what is described, there are remedies. That was not the issue I was dealing with in my article, and Judge Thomas plucked that out to make a point that apparently he was intent upon making.

Senator SPECTER. Well, OK. Even if he plucked it out, didn't you, in fact, say that it did divert attention from employers who had engaged in discriminatory practices to then adopt affirmative action plans?

Mr. DAYS. I did say that, and I think there may be situations that one has to be vigilant about, where an employer comes up and says "I have an affirmative action plan. I can't be a discriminator." And I think law enforcement officials and individuals and courts have to look beyond that.

Mr. LAWRENCE. Senator Specter—

Senator SPECTER. I won't pursue it further, but it seems to me a fair reading of this is that he did not quote you out of context. But I may be missing something.

Professor Lawrence.

Mr. LAWRENCE. I just wanted to add something because I think that this dialog, for me, gives us an opportunity to look at something that I think went unnoted in the discussion with Senator Hatch.

Senator SPECTER. Professor Lawrence, could I come back to you for that? I just want to finish up with Professor Days on one point. I would like to come back to you, if I may. Just one final question for Professor Days and then we will come back to you, Professor Lawrence.

Professor Days, do you think that Judge Thomas is intellectually and educationally qualified? And I ask you that because you are a professor at the Yale Law School, and we are about to have the dean of the Yale Law School testify in support of Professor Thomas. And we haven't given very much attention to that in the hearing, and I would be very interested in your evaluation as to whether he is intellectually and educationally qualified for the Supreme Court.

Mr. DAYS. My answer is, based upon the record as I have seen it, that he is qualified. Certainly having gone to Yale Law School, I could hardly be in a position to quarrel with that.

Senator SPECTER. Good.

Mr. DAYS. What I am interested in is how he used that education.

Senator SPECTER. On behalf of all the Yale Law School graduates.

Mr. DAYS. Indeed.

Senator SPECTER. Excuse me, Professor Lawrence. You had an addendum?

Mr. LAWRENCE. Right. The addendum I had, Senator Specter, was that I think that rather simplistic dichotomy that Judge Thomas and Senator Hatch have drawn between voluntary affirmative action and affirmative action in response to identified discrimination is troublesome for me and I think misleading. And I think it ties in with the comment that Professor Days made in this footnote, because I think that, as Professor Days noted, the Congress in these cases like *Weber* has identified systemwide, systematic discrimination in certain industries, and sees that, as a pragmatic matter, this discrimination cannot be ended. We do not have the resources to bring case after case, particularly individual case after case. And when we can encourage employers to identify their own past discrimination and enter into voluntary programs, that these voluntary programs are, indeed, remedial. They are remedial of and identify past discrimination by the employer who imposes it upon oneself.

Now, certainly there will be individual cases where the employer may try to hide behind that, and it is up to the Government enforcement agencies to identify those. But I think it very important to understand that voluntary affirmative action does not mean that there has not been past discrimination.

Senator SPECTER. Thank you very much, Professor Lawrence.

Just one comment in concluding, Mr. Chairman. The yellow light is on. I think it is important for people to focus—and it ought to be said explicitly—that when help is given for those who are discrimi-

nated against, it is not only for justice for them, but it has very broad societal benefit. It goes beyond the discriminated class. It goes beyond African-Americans. It helps society as a whole. But when you help African-Americans who are discriminated against and bring them into a part of the share of the American livelihood, and women, it helps us all. It tackles basic problems in the core society. And too many people think of us against them. And when you help the minorities, it is more than justice for them; it is a benefit for all of us, what we are looking for.

Thank you very much.

Senator KENNEDY. Thank you very much.

Senator SIMPSON.

Senator SIMPSON. Thank you, Mr. Chairman.

I welcome this panel. I see Drew Days, and I remember some very delightful visits with him when I was a freshman U.S. Senator. This is a very impressive man, and he was very helpful to me in my beginnings here. And I think he served with real distinction. It is nice to see you again.

Mr. DAYS. Thank you, Senator.

Senator SIMPSON. The other gentlemen, I know of your reputations and your interest, and you present things very crisply for us. It is our job to do this advise and consent, and I know that you have certainly been in the forefront of these things and these kinds of hearings in the past.

It is for us to do this process, and all of you have testified as to the fact that he has this extraordinary early life experience, and yet it doesn't seem to have done what should be done, or at least given a result that you would like to see with regard to his writings and his commentaries and so on; that he has simply been a good soldier in the Reagan-Bush administration, has not been too forthcoming, has done little to help out those on the fringes of society; and, of course, trying, as so many have, to put the test to him on, you know, what would you decide with *Roe v. Wade*, what would you do and go back and look at his commentaries on *Brown* and many other cases.

You all speak eloquently in support of affirmative action, and you state your clear views on title VIII, and you talk about the issue of economics versus these other things that are more personal. But one of the witnesses yesterday spoke of a study of what characteristics a good Justice would have in common with some of our fine Justices in the past, and the word "character" continued to be used a great deal. Character. Strength of character, if you will, the most common attribute of our best Justices. And those that perhaps came through the crucible of a life described as we know it now of Justice Thomas, might be one who would have the firmest and strongest character.

Do you agree with that statement about character alone, not about cases and the things to come and philosophies, but just plain old character?

Mr. DAYS. Senator, I think character is very important, but I am at a loss as to how to accurately and predictably measure character or the impact that character will have on the decisions and functioning of the Supreme Court Justice.

What I have to rely upon is what a person has done and what a person has said, and I might have some hopes harbored deep down in me that that person will grow, that person may change, that person may broaden his or her outlook, but that is pure speculation on my part and I do not know whether that is a satisfactory basis for making the decision to confirm somebody to the Supreme Court.

Mr. EDLEY. Senator, I would put it more strongly than Professor Days. I think that good character and integrity are necessary, but not sufficient. The good character will not predict whether or not a Justice appointed in 1885 will work to usher in the *Lochner* era, will vote in the majority in *Plessy v. Ferguson*. Character alone will not be a good predictor of the constitutional vision that that Justice brings to the Court.

So, while I certainly would urge the committee to satisfy itself with respect to the nominee's character, I would also urge you to discern his constitutional vision. It seems to me you have a responsibility, in partnership with the President, to determine the course of our constitutional history, to determine what vision will be represented on that Court, and if you focus exclusively on character, it does not seem to me that you were discharging that shared responsibility with the President.

Senator SIMPSON. Professor Lawrence, do you have any thought on that?

Mr. LAWRENCE. I would only add, Senator Simpson, that, to my mind, I have very little to go on in judging Judge Thomas' character. I would certainly, as Professor Days has indicated and I indicated in my opening statement, want to believe, very strongly want to believe, as a fellow African-American, that this is a person of the highest character.

I think that it is true that when one, as you say, passes through the crucible of American racism and poverty, that that can be a character builder. I think that it can do other things, as well, that we certainly have too much evidence in our community of people whose character has been destroyed by that same experience. I am not saying that is true of Judge Thomas. I believe that his character is a good one, but I have very little evidence to know that, except for the record, the public adult record. I cannot rely upon just the fact that he has lived through this experience.

Mr. DAYS. Senator, may I just add one brief footnote to my remarks—

Senator SIMPSON. Please.

Mr. DAYS [continuing]. And that has to do with the function of a Justice of the Supreme Court. When a new Justice gets into conference, I assume that his brothers and sisters will recognize that he is a person of high character. The question is what kinds of arguments is he going to make, what kinds of positions will he or she take. Indeed, in opinions and dissents, how will that person express himself or herself?

We give character as the baseline, but it is how that Justice explains what is going on in the world and how the Constitution is supposed to influence that. People will live or die, based upon not his character, but how he views the law and how he thinks it applies to their situations.

Senator SIMPSON. I concur with that totally. I have been impressed in my research and in the testimony of Judge Thomas that the people that know him the very best are saying things about him that I have never heard about anybody in my time here on this panel, Democrat or Republican alike, under Jimmy Carter, under Ronald Reagan, under George Bush.

I have never heard those things said about a man by the people who know him best, the people in the EEOC—and I went and visited with them, as I said before—people who worked with him, and his degree of, an overworked word, sensitivity and compassion I think is beyond commentary as to what he would do.

He spoke eloquently of how the person facing abortion, what an anguishing decision. He spoke eloquently of the criminals awaiting justice in the system. To me, that is what it is all about. Is this a man, when your case is being presented, who is going to listen, pay attention, and then generate the motions of fairness and compassion and sensitivity, love, caring, you know, the works, that is what this is all about in my mind, not sterility, you know, of what he might or might not do based upon this or that.

Of course, you three have watched this confirmation process now for years and know that we are slowly going to get to the point where we will just not know anybody at all when they get here, some big zip will be presented to us and we will mess around trying to figure out who he or she is, and the more zip, the better chance they will have—I mean zip in a zero, and not zip in spirit.

Mr. DAYS. Senator, may I say one thing in that respect?

Senator SIMPSON. Yes.

Mr. DAYS. I have read all the transcripts of these proceedings and seen some of them on television, and I was very affected, Senator, by your report of your visit to the EEOC. But I will tell you something that sticks with me today and has troubled me throughout these proceedings, and it has to do with—I know that you have been crossing swords over the question of abortion, but I was struck by the fact that Judge Thomas gave his speech in the Lew Lehrman Auditorium to the Heritage Foundation, and he commended the approach that Lewis Lehrman took, using natural law—and, Senator Biden, I do not want to get into natural law, it is another point.

The CHAIRMAN. That is OK by me.

Senator HATCH. It is OK by us, too. [Laughter.]

Mr. DAYS. He was asked about this particular speech and whether he had read then or since Lewis Lehrman's speech, he said he had not. Now, I put his comments about the importance of this issue in our society and how it divides the society and how painful it is for all of us to deal with, and some of us have had to deal with the issue up close. For a person to talk about that issue, without even having read the speech that asserted that a fetus was as person, strikes me as not sensitive at all. It strikes me as the height of insensitivity, given the tremendous emotion that is invested in the issue of abortion in the society.

Senator SIMPSON. I do hear that, but I think if you go look at his testimony, you can see exactly what he explained as he was asked about that speech, and it is funny to me how Lew Lehrman, you know, somehow has been in his life and place on the scene has

been distorted. He ran for the governorship in New York and damn near beat Cuomo. I mean he is not some fellow that just, you know, dropped down on the playing field and suddenly began to babble conservative things. He presented himself in a way where I believe that he got 49 percent of the vote in New York, or 48, in a very spirited race with the present Governor.

Anyway, I have much more and you are very good to respond, and I thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I next recognize a fellow who 15 years ago probably never thought that on his 58th birthday he would be sitting on a panel about to ask questions of a nominee to the Supreme Court. Senator Grassley, by the way, happy birthday.

Senator GRASSLEY. Thank you. I have no questions of this panel.

The CHAIRMAN. Well, we should do this more often on his birthday. [Laughter.]

I have been listening to the admonishments of the Senator from South Carolina, who has been telling me—and he will tell me, I assure you, throughout these hearings—that we should make them move more rapidly. We are going to limit witnesses to 5 minutes, and Senators to 10 minutes. It is important for Senators, like Senator Hatch, who have additional questions or comments to be able to speak, notwithstanding the fact that we have a large witness list.

So, I am going to recognize Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

I have appreciated the testimony you brought here. We differ, but that is what makes America great, too. One thing, though, I did want to bring out is this issue of preferences. On the current civil rights bill, there was an amendment, an anti-preference amendment to do away with it. I voted for that. I have to say a number of others voted against it and it was defeated.

But Thomas' approach is that we should not have preferences on a racial basis or on a gender basis or any other basis that discriminates against other people. And I am concerned about it, because in this country today, almost everybody, one way or the other, has faced that issue at one time or another in their lives, and it is creating difficulty and problems over America which I think, in a sense, is creating even more unrest and distress.

Mr. Days, as you know, I have a great deal of regard for you, and I certainly respect both the others. I just do not know you as well as I know Mr. Days. But I do not think that lumping veterans preferences or welfare or food stamps or any number of other preferences that have given society into this particular discussion is correct, because, first of all, society does make preferences.

We in many ways take care of the poor, the sick, the needy, persons with disabilities, and those are preferences, but they are race neutral preferences, and veterans preferences are race neutral preferences. I think what Clarence Thomas is saying is, look, there is no justification to ever have racial preferences based solely on race or any kind of preferences based solely on what a person is or is not in our society. That ultimately involves discrimination against others.

Now, I think there are two interesting sides to this issue. If we could solve it, you and I would be so happy, because it is one of the real problems in our society today. I would like you, all three of you, if you will—I have respect for your intellectual acumen, individually—give some thought to how we might help everybody who is disadvantaged, not just those who are African-Americans or Hispanic-Americans or Asian-Americans, or whatever, but everybody who is disadvantaged, but at the same time really put some teeth into stamping out discrimination by building upon maybe these ideas that Clarence Thomas has, and others have, as well, to basically end discrimination through tougher penalties, rather than discriminating against other people, through reverse discrimination.

I think tougher penalties, either monetary sanctions or criminal penalties, may be the real way to get to the bottom of discrimination, and I think you would avoid the problem of so many people feel they are discriminated against, because we give racial preferences on the basis of race in any given situation.

But I would like to have your thoughts on that. I would like you to write to me and tell me how you think that might work and what might be the better approach, and give me what you think are the subtleties and the intricacies of how we would handle that type of approach vis-a-vis the other.

Now, I am not asking you to give up your ideas on the other, but I would like you to give me some suggestions, all of us some suggestions and ideas on how we might better really resolve these problems of discrimination in America.

Mr. DAYS. May I just respond briefly, Senator?

Senator HATCH. Surely.

Mr. DAYS. The problem I have with tougher criminal penalties is not that we find the evil actor, that person should not be penalized to the ultimate of the law, it is that, in so many respects, we have gone beyond that point in our society and we are dealing with employers who are not evil actors—

Senator HATCH. Right.

Mr. DAYS. [continuing]. But they have run institutions that in the past excluded minorities or women, and then the question becomes one of, well, how do we get them. Well, the employer says I have a test that I use to determine whom I am going to hire, and the laws well, well, if that test has a discriminatory impact upon those groups, then something has to be done about it.

Senator HATCH. Right.

Mr. DAYS. Now, that is not the employer that you want to put behind bars. Yet, what is the solution? The solution has been that the *Griggs* test, the approach that has been developed based upon *Griggs*, and even to this day is acknowledged, at last in part by the Supreme Court, is an answer that we have to continue to use until we have dealt with those institutional systemic problems of discrimination.

Senator HATCH. I am a hundred percent behind the *Griggs* test, and I think most people in the Congress really are.

Mr. DAYS. That makes me feel great, Senator.

Senator HATCH. I know, but I am.

Mr. DAYS. The counting that I have done on the Supreme Court makes me less comfortable.

Senator HATCH. To make a long story short, I really do believe that—I am not just talking criminal sanctions. That would only be used in the most extreme cases, but actual monetary penalties and sanctions, which business people did pay attention to because that is the bottom line to them. And I think that there may be some way of utilizing that. That is why I am asking you to consider it. There may be some way of utilizing that that gets us off of this racial preference approach, that discriminates against others who feel that sting of discrimination too, in our desire to get rid of past discrimination and current discrimination really at the expense of innocent people. And that is all I am asking, help us on this, because you people deal with this every day. I do in a sense, but not nearly in the depths that you have to and that you have personally.

So I am asking for help here, and sincerely doing so.

Mr. EDLEY. Senator, I appreciate the invitation to write you and will do that.

Senator HATCH. Good.

Mr. EDLEY. What I hope that the committee will focus on, however, is: In the context of this nomination, it seems to me that the committee should be looking for two things in the nominee. One of those is an ability to engage in precisely the kind of pragmatic, conceptually rich exchange about issues of race relations that you and Professor Days have been engaged in for the last couple of minutes. But the other is to see whether or not the nominee is someone who will not act as a superlegislator, someone who will be respectful of the policy balances that are struck by you here in the Congress.

Now, on both of those two criteria, pragmatism, principled pragmatism on the one hand and respect for the congressional role on the other, it seems to me this nominee on the record—not on his character but on his record—is woefully lacking. The manner in which he has engaged in discussions of these race issues in the past has not been along the terms that we have been engaged in for the last several minutes. Instead it has been dogmatic, as I was discussing with Senator—

Senator HATCH. Well, I think those are interesting comments. I didn't mean to cut you off.

Mr. EDLEY. And with regard to the respect for the congressional role, his repeated view, in my estimation, in my assessment, extreme and outside the mainstream interpretation of title VII as it now stands on the books and of judicial precedents indicate, it seems to me, that he would not be a fair umpire in disputes between the branches, a fair umpire in interpreting congressional will. Everything in the record suggests that as a Supreme Court Justice he would seek to implement the policy preferences, the preferred interpretations of statute in the 14th amendment that he has been speaking for the last 9 years, that he would overturn *Santa Clara*, that he would overturn *Weber*, that he would overturn *Fullilove*. He hasn't said anything to the contrary.

The work that the Congress has been doing in the last couple of years on civil rights legislation, it seems to me, is quite at odds

with the positions that this nominee has taken historically. And a close reading of the transcript does not dispel the concern that I have that as a Justice he would be an activist in every bit the same way that the current Supreme Court has been an activist, to the collective dismay of the Congress, on civil rights issues.

Senator HATCH. Well, what you seem to be saying is that if he is a liberal activist that is fine, but if he is a conservative activist that is not so good.

Mr. EDLEY. No, I—

Senator HATCH. Let me just say this: I have known Clarence Thomas for 10 years, and I have to say that it is interesting how two individuals can perceive a person so much differently.

For instance, I have no doubt in my mind—well, you will probably notice that the only affirmative action questions came from this side of the table. It started with Senator Specter, and I was the only other one to even raise the issue. Nobody on the other side raised the issue, to my recollection—although they may have. I may have been temporarily absent on a couple of occasions. But it was raised by us because we think it is an important issue.

I have known him for 10 years, and I have to say, No. 1, on the pragmatic issue, he understands this area very, very well. Probably as well as any of you do. In fact, I would submit he does. He has had wide experience, both in the private sector as a corporate lawyer, in the State, in all three branches of the Federal Government, and really almost 10 years in the EEOC which is one of the most complex, difficult agencies to run.

I think if anybody does understand these issues, it has got to be Clarence Thomas. And part of the reason that I understand him is we have had a dialog for 10 years. Now, part of it also because Mr. Days and I have had dialog on these issues as well, and I consider very few people his equal in this area.

So, No. 1, I think he does understand it, and I think he takes a position that is contrary to yours and I think which is supported by the vast majority of the American people. No. 2, with regard to his fairness, I want you to know that I know Clarence Thomas very well, and over the last 10 years, if I was to pick a person who would be super fair on race relations and equal rights and civil rights, he would be one of the people that would be at the top of the list, because I think he will be. And I do not think he will be an activist for conservative principles. I think he will be an activist in trying to make sure that individuals are granted rights and are kept free and that they have civil rights and equality.

So that has been my perception. Yours is different. And mine comes from very practical experience of working with him as chairman of the Labor Committee and also as ranking member since Senator Kennedy has become chairman on problems on a daily basis involving these very problems.

So I think we both share the same concerns. All four of us—the three of you and myself—and I think Clarence Thomas would like the same type of results. The question where we differ is what is mainstream in America and what isn't. And I submit that the vast majority of the American people would agree with Clarence Thomas on the issue of preferences.

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

could enter, or to be required to pay for that food before it was given, to ride always in the rear of the bus, and to see their parents suffer like indignities. Such treatment could easily leave a person embittered and scarred, but such is not the person we meet in Clarence Thomas.

Even in his early years, Clarence was an independent thinker, one who challenged the status quo. Is it any wonder, then, that at a young age, he questioned the daily recitation of the Pledge of Allegiance, which ensures liberty and justice for all, when neither liberty nor justice was available to black children? Do we perhaps begin to see here the early beginnings of a judicial mind, so ably demonstrated at these hearings?

I taught Clarence Thomas in the eighth grade. He was a regular fun-loving boy. He was cooperative and studious, willing to give a helping hand to those less able than himself. He was always grateful to those who provided a home for him and to the Sisters who taught him. He seemed to recognize and appreciate the sacrifices others made for his betterment.

Even in later years, after his appointment as Chairman of the EEOC, Clarence Thomas showed his gratitude by making a special visit to Boston to thank me and the other Sisters who had taught him. I might add that the 1,000 or more young people, who over several years graduated from my class, Clarence was one of the few who came to say "thank you."

His question on that occasion was a searching one: Why was it that you Sisters could do for us black kids what nobody else could or did do? My answer had to be that, as followers of our founders, who, like St. Francis, loved God and his poor, we too would love God in the person of these children put especially in our care.

During these hearings, much has been said about certain speeches and writings of Judge Thomas. One speech with which I am familiar has not been referred to thus far. I am referring to a speech delivered to the Franciscan Sisters in a fund raising appeal. It is dated April 5, 1986, for your easy reference and reading, and I highly recommend it.

What has since become a national concern was then a grave concern for Clarence Thomas. He said, and I quote:

What we had yesterday is precisely what we need now, as a bare minimum, as an indispensable starting point, that is, God, values, morality, and, of course, education. The Sisters accepted our equality without a Civil Rights Act, they accepted equality of education without a Supreme Court decision, they lived in the inner city with us before we knew that it was the inner city.

Judge Thomas has not forgotten his roots. He lived day by day the cruel story of discrimination. He knows the results of being on the wrong side of the law, not because of what one has done, but because of the color of one's skin.

I am most grateful for having this opportunity to testify in favor of Judge Thomas' confirmation as a Justice of the Supreme Court. The road from the unpaved streets of our part of Savannah to these hallowed halls cannot have been an easy one to travel, but Clarence Thomas has demonstrated that he has overcome obstacles that might have defeated a lesser man.

Thank you.

The CHAIRMAN. Thank you, Sister.

Father Brooks.

**STATEMENT OF FATHER JOHN E. BROOKS**

Father BROOKS. Mr. Chairman, I am the Reverend John E. Brooks of the Society of Jesus, president of the College of the Holy Cross in Worcester, MA.

It is both an honor and a pleasure for me to appear before you on behalf of Judge Clarence Thomas and to participate in the process which I hope will conclude with the seating of Judge Thomas as an Associate Justice of the Supreme Court. I have known Judge Thomas for almost a quarter century, so I believe I can speak about him with some authority.

I first came to know Judge Thomas when he was a student at the College of the Holy Cross from 1968 to 1971. When he entered the college, I was vice president and academic dean. Appointed president of the college in 1970, Judge Thomas' graduating class in 1971 was the first over which I presided as president.

In preparation for this meeting today, I came across a memorandum which I had written on April 21, 1970, to the Reverend Raymond J. Swords of the Society of Jesus, my immediate predecessor in the presidency of the college, in which memorandum I had recommended that he appoint Clarence Thomas to membership in Alpha Sigma Nu, the national Jesuit College Honor Society. The reasons I gave them may be of interest today. Allow me to quote from that memo.

May I recommend that you consider nominating Clarence Thomas, class of 1971, to membership in Alpha Sigma Nu. Clarence has a cumulative quality point index of 3.577 and ranks very high in his class. He is a member of the Purple Key, the Black Student Union, and is genuinely respected by his fellow students.

The good judgment, integrity, and serious concern for the college which I had observed in Clarence Thomas as a student, and then his educational record and experience which I had followed closely during the years following his graduation from Holy Cross, led me to seek his appointment to the board of trustees of the college in 1978. He served two 4-year terms from 1978 through 1986, and he was reelected to the board in 1987, and continues to serve at the present time.

Judge Thomas is an active member of our board, concerned about all those things board members ought to take seriously: Educational quality, finances, student and faculty productivity and the like. However, I would like to limit my remarks to characteristics I have observed in him which I suspect have some bearing upon his fitness to serve on our highest Court. They are his energetic concern for the education of all our young people, especially for those of minority backgrounds, and his very practical approach to obtaining it for them. Judge Thomas is a realist. He knows the essential part which a good solid education has played in his own rise from abject privation to prominence, and he knows that it is the key which will unlock the same doors for others. Judge Thomas has been an active recruiter of minority students for Holy Cross, making the college known to them, assisting them in the application process, and making sure that, once enrolled, they do not drop out.

I find it difficult to recall a single meeting of the board of trustees during which Judge Thomas did not question the administrators of the college, including the president, about the status of minority recruitment—how many African-American students did we enroll; how many had applied; from which high schools; with what SAT scores; about the status of financial aid for minority students; about the relative rank in class of minority students; about the social climate for minority students; about the graduation record of minority students. With a willing acknowledgment that minority students might need and be given some special and supplementary counseling, Judge Thomas insisted always that every student be held to the same standards of excellence and that each one be given the opportunity and effective encouragement to attain excellence.

As a trustee, Judge Thomas met frequently with African-American students at Holy Cross. On occasions of his visits to the college, he scheduled meetings with our Black Student Union so that he might have a firsthand, personal knowledge of those students with a background like his own. Over the years, he became a kind of role model for our African-American students, and in speaking with them, he was never stingy with either advice, know-how, or making the right connections for them. His message was never an easy one, but it was real and it was practical: Work hard, make the best of every opportunity, and know that we are there to help in every way we can.

Judge Thomas is a practical man. He is well aware that the board, room, and tuition costs at a private, 4-year, liberal arts college like Holy Cross are far and beyond the financial resources of almost all minority applicants. He has been constant in his support for our Martin Luther King, Jr., scholarship program for African-American students which makes possible for others the same brand of opportunity which was made possible for him.

Over the past few months, you have heard and read a great deal about Judge Clarence Thomas. My personal knowledge of him convinces me that he is a man of compassion, good judgment, and intelligence. His zeal for justice, freedom, and equal opportunity for all Americans is well-known to us at Holy Cross. Our highest Court will be greatly honored and enriched by his service.

I thank you, Mr. Chairman.  
[Prepared statement follows.]

CLARENCE THOMAS SENATE HEARINGS  
16 September 1991

MR. CHAIRMAN:

I AM THE REVEREND JOHN E. BROOKS, S.J., PRESIDENT OF THE COLLEGE OF THE HOLY CROSS IN WORCESTER, MA.

IT IS BOTH AN HONOR AND A PLEASURE FOR ME TO APPEAR BEFORE YOU IN BEHALF OF JUDGE CLARENCE THOMAS AND TO PARTICIPATE IN THE PROCESS WHICH I HOPE WILL CONCLUDE WITH THE SEATING OF JUDGE THOMAS AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT. I HAVE KNOWN JUDGE THOMAS FOR ALMOST A QUARTER CENTURY, SO I BELIEVE I CAN SPEAK ABOUT HIM WITH SOME AUTHORITY.

I FIRST CAME TO KNOW JUDGE THOMAS WHEN HE WAS A STUDENT AT THE COLLEGE OF THE HOLY CROSS FROM 1968 TO 1971. WHEN HE ENTERED THE COLLEGE, I WAS VICE PRESIDENT AND ACADEMIC DEAN. APPOINTED PRESIDENT OF THE COLLEGE IN 1970, JUDGE THOMAS' GRADUATING CLASS IN 1971 WAS THE FIRST OVER WHICH I PRESIDED AS PRESIDENT.

IN PREPARATION FOR THIS MEETING TODAY, I CAME ACROSS A MEMORANDUM WHICH I HAD WRITTEN ON APRIL 21, 1970 TO THE REV. RAYMOND J. SWORDS, S.J., MY IMMEDIATE PREDECESSOR IN THE PRESIDENCY OF THE COLLEGE, IN WHICH I HAD RECOMMENDED THAT HE APPOINT CLARENCE THOMAS TO MEMBERSHIP IN ALPHA SIGMA NU, THE JESUIT COLLEGE HONOR SOCIETY. THE REASONS I GAVE THEN MAY BE OF INTEREST TODAY. LET ME QUOTE FROM THAT MEMO:

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"...MAY I RECOMMEND THAT YOU CONSIDER NOMINATING CLARENCE THOMAS, CLASS OF 1971 TO MEMBERSHIP IN ALPHA SIGMA NU. CLARENCE HAS A CUMULATIVE QPI (QUALITY POINT INDEX) OF 3.577 AND RANKS VERY HIGH IN HIS CLASS. HE IS A MEMBER OF THE PURPLE KEY, THE BLACK STUDENT UNION AND IS GENUINELY RESPECTED BY HIS FELLOW STUDENTS."

THE GOOD JUDGMENT, INTEGRITY, AND SERIOUS CONCERN FOR THE COLLEGE WHICH I HAD OBSERVED IN CLARENCE THOMAS AS A STUDENT, AND THEN HIS EDUCATIONAL RECORD AND EXPERIENCE WHICH I HAD FOLLOWED CLOSELY DURING THE YEARS FOLLOWING HIS GRADUATION FROM HOLY CROSS, LED ME TO SEEK HIS APPOINTMENT TO THE BOARD OF TRUSTEES OF THE COLLEGE IN 1978. HE SERVED TWO FOUR-YEAR TERMS FROM 1978 - 1986, WAS REAPPOINTED TO THE BOARD IN 1987 AND CONTINUES TO SERVE AT THE PRESENT TIME.

JUDGE THOMAS IS AN ACTIVE MEMBER OF OUR BOARD, CONCERNED ABOUT ALL THOSE THINGS BOARD MEMBERS OUGHT TO TAKE SERIOUSLY; EDUCATIONAL QUALITY, FINANCES, STUDENT AND FACULTY PRODUCTIVITY AND THE LIKE. HOWEVER, I WOULD LIKE TO LIMIT MY REMARKS TO CHARACTERISTICS I HAVE OBSERVED IN HIM WHICH I SUSPECT HAVE SOME BEARING UPON HIS FITNESS TO SERVE ON OUR HIGHEST COURT. THEY ARE HIS ENERGETIC CONCERN FOR THE EDUCATION OF ALL OUR YOUNG PEOPLE, ESPECIALLY FOR THOSE OF MINORITY BACKGROUNDS, AND HIS VERY PRACTICAL APPROACH TO OBTAINING IT FOR THEM. JUDGE THOMAS IS A REALIST. HE KNOWS THE ESSENTIAL PART WHICH A GOOD SOLID EDUCATION HAS PLAYED

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IN HIS OWN RISE FROM ABJECT PRIVATION TO PROMINENCE, AND HE KNOWS THAT IT IS THE KEY WHICH WILL UNLOCK THE SAME DOORS FOR OTHERS. JUDGE THOMAS HAS BEEN AN ACTIVE RECRUITER OF MINORITY STUDENTS FOR HOLY CROSS, MAKING THE COLLEGE KNOWN TO THEM, ASSISTING THEM IN THE APPLICATION PROCESS AND MAKING SURE THAT ONCE ENROLLED, THEY DO NOT DROP OUT.

I FIND IT DIFFICULT TO RECALL A SINGLE MEETING OF THE BOARD OF TRUSTEES DURING WHICH JUDGE THOMAS DID NOT QUESTION THE ADMINISTRATORS OF THE COLLEGE, INCLUDING THE PRESIDENT, ABOUT THE STATUS OF MINORITY RECRUITMENT -- HOW MANY AFRICAN-AMERICAN STUDENTS DID WE ENROLL, HOW MANY HAD APPLIED, FROM WHICH HIGH SCHOOLS, WITH WHAT SAT SCORES; ABOUT THE STATUS OF FINANCIAL AID FOR MINORITY STUDENTS; ABOUT THE RELATIVE RANK IN CLASS OF MINORITY STUDENTS; ABOUT THE SOCIAL CLIMATE FOR MINORITY STUDENTS; ABOUT THE GRADUATION RECORD OF MINORITY STUDENTS. WITH A WILLING ACKNOWLEDGEMENT THAT MINORITY STUDENTS MIGHT NEED AND BE GIVEN SOME SPECIAL AND SUPPLEMENTARY COUNSELLING, JUDGE THOMAS INSISTED ALWAYS THAT EVERY STUDENT BE HELD TO THE SAME STANDARDS OF EXCELLENCE, AND THAT EACH ONE BE GIVEN THE OPPORTUNITY AND EFFECTIVE ENCOURAGEMENT TO ATTAIN EXCELLENCE.

AS A TRUSTEE, JUDGE THOMAS MET FREQUENTLY WITH AFRICAN-AMERICAN STUDENTS AT HOLY CROSS. ON OCCASIONS OF HIS VISITS TO THE COLLEGE HE SCHEDULED MEETINGS WITH OUR BLACK STUDENT

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UNION SO THAT HE MIGHT HAVE A FIRST-HAND PERSONAL KNOWLEDGE OF THOSE STUDENTS WITH A BACKGROUND LIKE HIS OWN. OVER THE YEARS, HE BECAME A KIND OF ROLE MODEL FOR OUR AFRICAN-AMERICAN STUDENTS AND IN SPEAKING WITH THEM, HE WAS NEVER STINGY WITH EITHER ADVICE, KNOW-HOW, OR MAKING THE RIGHT CONNECTIONS FOR THEM. HIS MESSAGE WAS NEVER AN EASY ONE--BUT IT WAS REAL AND PRACTICAL: WORK HARD, MAKE THE MOST OF EVERY OPPORTUNITY, AND KNOW THAT WE ARE THERE TO HELP IN EVERY WAY WE CAN.

JUDGE THOMAS IS A PRACTICAL MAN. HE IS WELL AWARE THAT THE BOARD, ROOM AND TUITION COSTS AT A PRIVATE, FOUR-YEAR, LIBERAL ARTS COLLEGE LIKE HOLY CROSS ARE FAR AND BEYOND THE FINANCIAL RESOURCES OF ALMOST ALL MINORITY APPLICANTS. HE HAS BEEN CONSTANT IN HIS SUPPORT FOR OUR MARTIN LUTHER KING, JR. SCHOLARSHIP PROGRAM FOR AFRICAN-AMERICAN STUDENTS WHICH MAKES POSSIBLE FOR OTHERS THE SAME BRAND OF OPPORTUNITY WHICH WAS MADE POSSIBLE FOR HIM.

OVER THE PAST FEW MONTHS, YOU HAVE HEARD AND READ A GREAT DEAL ABOUT JUDGE CLARENCE THOMAS. MY PERSONAL KNOWLEDGE OF HIM CONVINCES ME THAT HE IS A MAN OF COMPASSION, GOOD JUDGMENT AND INTELLIGENCE. HIS ZEAL FOR JUSTICE, FREEDOM AND EQUAL OPPORTUNITY FOR ALL AMERICANS IS WELL-KNOWN TO US AT HOLY CROSS. OUR HIGHEST COURT WILL BE GREATLY ENRICHED BY HIS SERVICE.

THANK YOU.

The CHAIRMAN. Thank you very much, Father.

Judge Gibbons, it is good to see you again. As I should note for the record, everyone in the third circuit took and takes great pride in you. You are one of the fine judges in this country, and it is a pleasure to have you here. It really is. I am not being solicitous.

#### STATEMENT OF HON. JOHN GIBBONS

Mr. GIBBONS. It is a pleasure to be here, Mr. Chairman.

I am the Richard J. Hughes professor of constitutional law at Seton Hall University.

The CHAIRMAN. Did I say Rutgers?

Mr. GIBBONS. You said Rutgers, and I have had the pleasure of teaching there as well.

The CHAIRMAN. I beg your pardon.

Mr. GIBBONS. And as you mentioned, I was, until January 15, 1990, chief judge of the third circuit, and I served as a judge on the court of appeals for 20 years.

Until September 6 last, I was vice chairman of the board of trustees of Holy Cross College, and it was in that capacity that I came to know and to respect Clarence Thomas.

In my dealings with him, I was left with the clear impression that Judge Thomas is intellectually gifted, open-minded, not doctrinaire, and receptive to persuasion. He is, I am convinced, anything but the rigid, inflexible conservative that some have charged him with being.

The most puzzling charge against him is that Judge Thomas will be unsympathetic to human rights claims. One experience that I shared with him serves to illustrate the contrary. On September 14, 1985, I presided at a meeting of the Holy Cross Board of Trustees which took up the issue of divestiture by the college of investments in companies doing business in South Africa. The choice was between complete divestiture on the one hand, and on the other, divestiture only of those companies which did not adhere to the so-called Sullivan principles governing company treatment of employees and others. Strong, and on the whole quite reasonable, arguments were put forth by board members in favor of the Sullivan principles position. Some members even had connections with companies which they were convinced were doing a great deal to improve the lot of black South Africans.

When Clarence Thomas' turn came to speak, he eloquently urged the board to opt for total divestiture. His reasons are relevant, I think, to this committee's inquiry. He insisted that every person had a prepolitical right to be treated as of equal worth, and that any regime which by law refused to recognize that right was so illegitimate that it should be replaced.

Largely because of Clarence Thomas' reasonable articulation of a human rights position, the board was persuaded to opt for total divestiture.

This incident occurred long before Clarence Thomas was under consideration for the Supreme Court, or even the court of appeals. Thus, his philosophical position on the existence of prepolitical human rights which governments should recognize was well thought out long before the question of his judicial philosophy was

ever an issue. It was no surprise to me, therefore, that in some other forums he articulated a similar philosophical position.

There is, of course, a difference between political philosophy and jurisprudence. It is entirely conceivable that one may recognize the injustice of inequality and at the same time insist, as legal positivists do, that judges may not resort to philosophical notions of justice to go beyond the text of a law enacted by others. Judge Bork, for example, is an articulate spokesman for the legal positivist position who unquestionably personally abhors many of the instances of injustices about which, he thinks, judges are powerless.

In his answer to Senator Biden's question on Tuesday last about a constitutional right of privacy, Judge Thomas on the other hand acknowledged the legitimacy of the Supreme Court's recognition of that nontextual human right.

The recognition by the Supreme Court, in interpreting the Constitution, of nontextual prepolitical human rights poses for a democracy the majoritarian dilemma, no better articulated than by the late Alexander Bickel. Bickel also articulated the most significant restraint upon life-tenured Supreme Court Justices; namely, their dedication to the Court's tradition of deciding great matters of principle only after meticulous scholarship and adversarial development of the competing arguments.

One aspect—I see my light is on, Mr. Chairman, and I regularly enforced it against lawyers. So I suppose I should stop or at least ask for permission to continue.

The CHAIRMAN. If you are almost finished, please continue, Judge.

Mr. GIBBONS. All right. One aspect of that tradition is the Court's self-imposed limitation on its law-pronouncing function; its unwillingness to answer legal questions except when necessary for the pronouncement of judgments. Judge Thomas' refusal to state in advance how he would vote on any specific legal issue likely to come before the Court is thus entirely consistent with the Court's traditions of craftsmanship and scholarship. It is, I suggest, unwise for Senators to press prospective nominees for answers to such specific questions, for they thereby seek to have the nominee violate the best safeguard that we have against judicial activism.

Many thoughtful students of the judicial process were alarmed some time ago when rumors that Federal judicial nominees were at one stage being screened by the Justice Department on the basis of a litmus test on specific issues. It doesn't really matter whose litmus test is being applied. Asking for a prior commitment on any legal issue likely to come before the Court is wrong, and giving such a commitment in order to obtain confirmation would be even more wrong.

I was going to comment, Senator Biden, about my review of his written work as a judge, which is probably the best evidence, but I know you are pressed for time.

The CHAIRMAN. We will put the entire statement in the record, and I have a question for you about that anyway. So you will have an opportunity to do that.

[The prepared statement of Mr. Gibbons follows.]

## STATEMENT OF JOHN J. GIBBONS

September <sup>17</sup>~~11~~, 1991

I am here to urge favorable action on the nomination of Clarence Thomas to be an Associate Justice of the Supreme Court. Presently, I am the Richard J. Hughes Professor of Constitutional Law at Seton Hall University Law School. I am also Special Counsel at Crummy, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey, supervising that firm's Gibbons Fellowship Program in Public Interest and Constitutional Law. Until January 15, 1990, I was Chief Judge of the Third Circuit, and I served as a Judge of the United States Court of Appeals for that Circuit for twenty years. Until September 6 last, I was Vice-Chairman of the Board of Trustees of Holy Cross College, and it was in that capacity that I came to know and respect Clarence Thomas. As you know, he still serves as a member of that Board.

Because of our mutual interest in the law, we have on a number of occasions informally discussed issues of constitutional law. Such informal discussions among friends of subjects of mutual interest are frequently more revealing of underlying personal attitudes than are more formal pronouncements in speeches or papers. From them, I was left with the clear impression that Judge Thomas is intellectually gifted, a rigorous thinker, but open-minded, non-doctrinaire and receptive to persuasion. He is, I am convinced, anything but the rigid, inflexible conservative that some have charged him with being.

The most puzzling charge made against him is that Judge Thomas will be unsympathetic to human rights claims. One experience I shared with him serves to illustrate the contrary. On September 14, 1985 I presided at a meeting of the Holy Cross Board of Trustees which took up the issue of divestiture by the College of investments in companies doing business in South Africa. The choice was between complete divestiture on the one hand, and on the other, divestiture only of those companies which did not adhere to the so-called Sullivan Principles governing company treatment of employees and others. Strong, and on the whole quite reasonable, arguments were put forth by Board members in favor of the latter position. Some Board members had connections with companies which, they were convinced, were doing a great deal to improve the lot of black South Africans.

When Clarence Thomas' turn came to speak, he eloquently, but with reason more than passion, urged the Board to opt for total divestiture. His reasons are relevant, I think, to this Committee's inquiry. He insisted that every person had a pre-political right to be treated as of equal worth, and that any regime which by law refused to recognize that right was so illegitimate that it should be replaced. He urged that while the actions of private institutional investors might not bring South Africa to its knees, those actions would put pressure on the government of the United States to try to do so.

As I said, the choice between the Sullivan Principles and total divestiture was in 1985, one over which reasonable people could differ. Largely because of Clarence Thomas' reasoned articulation of a human rights position, the Board was persuaded to opt for total divestiture. As you know, many other institutions opted for the Sullivan Principles, or for no divestiture policy at all.

This incident occurred long before Clarence Thomas was under consideration for the Supreme Court, or even the Court of Appeals. Thus, his philosophical position on the existence of pre-political human rights which governments should recognize was well thought out long before the question of his judicial philosophy was an issue. It was no surprise to me, therefore, that in other forums he articulated a similar philosophical position.

There is, of course, a difference between political philosophy and jurisprudence. It is entirely conceivable that one may recognize the injustice of inequality and at the same time insist, as legal positivists do, that judges may not resort to philosophical notions of justice to go beyond the text of a law external to themselves. Judge Bork, for example, is an articulate spokesman for the legal positivist position who unquestionably personally abhors many instances of injustice about which, he thinks, judges are powerless. In his answer to Senator Biden's question on Tuesday last, about a

constitutional right of privacy, Judge Thomas, on the other hand, acknowledged the legitimacy of the Supreme Court's recognition of that non-textual human right.

The recognition by the Supreme Court, in interpreting the Constitution, of non-textual pre-political human rights, as you in the political branch of government are so well aware, poses for a democracy the majoritarian dilemma: when should the court exercise the awesome power to set aside laws enacted by popularly elected legislators? No one better articulated the dilemma than the late Alexander Bickel. He also articulated the most significant restraint upon life-tenured Supreme Court Justices; namely, their dedication to the Court's scholarly tradition of deciding great matters of principle only with careful craftsmanship after meticulous scholarship and adversarial development of the competing arguments. One aspect of that scholarly tradition is the Court's self-imposed limitation on its law-pronouncing function; its unwillingness to answer legal questions except when necessary to the pronouncement of judgments. Judge Thomas' refusal to state in advance how he would vote on any specific legal issue likely to come before the Court is entirely consistent with the Court's traditions of craftsmanship and scholarship. It is, I suggest, unwise for Senators to press prospective nominees for answers to such specific questions, for they thereby seek to have the nominees violate the best safeguard that we have against

so-called judicial activism. Watching the proceedings of this Committee, it occurred to me that had a Senator from Mississippi, for example, interrogated Governor Warren about how he intended to vote on the then-pending school desegregation appeals as vigorously as Judge Thomas has been interrogated on the issue which currently preoccupies some Committee members, I don't know how he would have responded. If, however, he had answered such questions, no matter how he answered them, he would have compounded the difficulties the Court faced in resolving that then-controversial issue.

Whatever else a Supreme Court nominee or any other judicial nominee should bring to the bench, one essential commitment must be that decisions on legal issues will be made only upon careful reflection after completion of the adversarial process. That is why many thoughtful students of the judicial process were alarmed about rumors that federal judicial nominees were at one stage several years ago being screened by the Justice Department on the basis of a litmus test on specific issues. It doesn't really matter whose litmus test is being applied. Asking for a prior commitment on any legal issue likely to come before the Court is wrong, and giving such a commitment in order to obtain confirmation would be even more wrong.

Certainly, however, it is perfectly proper for the Senate to inquire whether a nominee possesses those qualities of

intellect and temperament which suggest that he will be dedicated in his career to the Court's traditions of scholarship and craftsmanship. In this respect the best evidence is the ~~several~~ published opinions Judge Thomas has written as a Judge of the Court of Appeals. I have read ~~all~~ <sup>FI</sup> of them, and they are in this respect quite reassuring. They show an appropriate reliance on precedent, a fine appreciation of the deference the Courts owe to administrative agencies, a reading of federal statutes which shows proper acknowledgment of the primacy of the legislative process, and a respectful treatment of the arguments advanced even by the losing parties. One opinion that I particularly liked was United States v. Long, 905 F.2d, 1572 (D.C.Cir. 1990), in which, reversing a conviction for using a firearm during and in relation to drug trafficking, Judge Thomas declined the invitation of the Department of Justice to adopt an open-ended interpretation of the statutory language which would have facilitated convictions under Section 924(c)(1) of Title 18. Certainly this is not the opinion of a "knee jerk" conservative likely to be swayed by appeals to law and order, even here in the District of Columbia. My guess is that with respect to the rights of criminal defendants, his addition to the Court may result in a net improvement of its jurisprudence. I wouldn't ask him, however, and he shouldn't tell me.

Summarizing, I urge you to confirm Judge Thomas' nomination because my personal experience with him and my critical examination of his admittedly limited work as a judge convince me that he has the intellect, the temperament, the flexibility, the dedication to judicial craftsmanship, and the potential for growth to make a distinguished contribution to the Court's work over a long period of time.

## STATEMENT OF MS. NIARA SUDARKASA

Ms. SUDARKASA. Thank you, Mr. Chairman and members of this distinguished committee.

First of all, I want to express my appreciation for your allowing me to join this panel, in recognition of a prior commitment.

My name is Niara Sudarkasa, and I am pleased to have the opportunity to appear before you today in my capacity as an individual scholar who supports the nomination of Judge Clarence Thomas for the U.S. Supreme Court.

In my view, Judge Thomas has the education and experience, as well as the intelligence, integrity and high ideals necessary to serve on the Nation's highest court. But much of the debate over Judge Thomas' nomination has focused on his ideology, rather than his qualifications.

If I may, I would like to make a few comments in this regard.

Many of those who oppose Judge Thomas and some who support him seem to have assumed that his ideology could be pigeonholed, and used to predict the positions he would take if he were on the Supreme Court.

From what I have read by and about Judge Thomas, and from what I have heard this week, I believe, as others have said, that he is an open-minded and independent thinker, not one with rigid pre-packaged views. He has been characterized as insensitive to the concerns of African-Americans. Permit me to submit that I think because of his independence and his keen sense of justice and fairness, Judge Thomas looks at all sides of issues, when others might be content to examine only one.

For example, Judge Thomas wrestles with the issue of individual rights when considering group entitlements, because he knows that fairness and justice are not one-sided concepts. He struggles with the points of conflict between the principle of equality and the practice of affirmative action. But because of his open-mindedness, I believe Judge Thomas can be persuaded to see and, indeed, has been persuaded to see that, in order to address past discrimination, the concept of equity, rather than strict equality, has to be applied. The Constitution speaks of equality, but it also speaks of justice, and under various circumstances the principle of equity must be applied, in order to insure that justice and fairness will be the end result.

Leaders must be understood in the context of the times that spawned them. This is as true of Judge Thomas as it is of others. As African-Americans, we have been fortunate in having a long line of leaders who, in retrospect, seem right for their times. These leaders did not always have the same ideology or agree on strategies, but they all agreed that the goal was to secure freedom and justice for our people, and thereby help to insure freedom and justice for all. Who can say that we are not the better off for having had the benefit of their separate and distinct voices?

In the 1850's, there was Frederick Douglas fighting for the abolition of slavery, for voting rights for free blacks and for what we now call integration. But there was also Martin Delaney, an equally strong abolitionist, who sought freedom and prosperity through economic and political linkages with Africa, including the estab-

ishment of African-American settlements on the African Continent. The legacy of Douglas is the fight for equal rights; that of Delaney the struggle for economic empowerment for blacks and others.

At the turn of the 20th century, there was Booker T. Washington speaking for vocational education for the masses, self-reliance in the black community, and coexistence with segregation. At the same time, W.E.B. DuBois advocated a liberal education for the "talented tenth," economic interdependence and an end to segregation. Booker T. Washington, contrary to the opinions of some, left us quite a legacy. He left Tuskegee University, a healthy respect for black colleges and other black institutions, and an appreciation of the value of self-help. On the other hand, Dubois' legacy is that of the NAACP, admonition to "the talented tenth" to reach back and help the less fortunate, and the demand that America help those upon whose backs this country was built.

In the decade of the 1920's, there was the rise and fall of Marcus Garvey, the nationalist who preached "Africa for Africans" and "back to Africa," while envisioning a black-owned economic network spanning the Atlantic. In the same decade, there was A. Philip Randolph, the Socialist, who emerged as the leading spokesman for jobs and justice here in America. Garvey left us a legacy of racial pride and a commitment to cooperation among Africans at home and abroad. And A. Philip Randolph, who disavowed socialism and became one of the country's greatest labor leaders, taught us the effectiveness of direct action and planted the seeds for fair employment practices legislation.

In more recent times, there was Martin Luther King and Malcolm X, both committed to justice, equality and empowerment, but while Dr. King chose the path of integration, Malcolm chose separation, at least until near the end of his life. Both of them were taken from us in a flash, leaving a legacy of work unfinished and a job to be done.

My point, Mr. Chairman, is that different leaders have brought us thus far on our way, different voices have spearheaded the crusade for freedom and justice.

In the judicial arena itself, we see the great legacy of Thurgood Marshall, the brilliant architect of legal desegregation and the undefeated champion of civil rights. Thurgood Marshall, a man of and for his time.

Today, as we anticipate the appointment of Clarence Thomas to the Supreme Court, we see in him a leader with a different voice for a different time. We who have put our faith and confidence in him do not expect that he will abandon the quest for equal rights. As a matter of fact, we come forth now to challenge him to choose well the means by which he will carry on the quest for justice and equality. We ask him to be ever mindful of the words of Robert Hayden, the celebrated African-American poet, who suggested that we must not read until "it is finally ours, this freedom, this liberty, needful to man as air, usable as earth."

Senators I would say to you and to Judge Thomas, whose nomination I support, as a nation, we must not rest until Dr. King's dream becomes a reality. We cannot rest as we as a people have overcome.

Thank you.

[Prepared statement follows:]

TESTIMONY

by

Niara Sudarkasa, Ph.D.

Presented to the Senate Judiciary Committee  
Hearing on the Nomination of Judge Clarence Thomas to the Supreme Court  
September 17, 1991  
Washington, DC

Niara Sudarkasa is an anthropologist and president of  
Lincoln University, Lincoln University, Pa.

**Mr. Chairman, Members of this Distinguished Committee of the U.S. Senate, Judge Thomas, Ladies and Gentlemen:**

My name is Niara Sudarkasa, and I am pleased to have the opportunity to appear before you today in my capacity as an individual scholar who supports the nomination of Judge Clarence Thomas for the U.S. Supreme Court.

In my view, Judge Thomas has the education and experience, as well as the intelligence, integrity and high ideals necessary to serve on the nation's highest court. But much of the debate over Judge Thomas' nomination has focused on his ideology, rather than his qualifications.

Many who oppose Judge Thomas and some who support him seem to assume that his ideology can be pigeonholed, and used to predict the positions he will take on cases that will come before the Supreme Court.

From what I have read by and about Judge Thomas, and from what I have heard this week, I believe that he is an open-minded and independent thinker, not one with rigid pre-packaged views. He has been characterized as insensitive to the concerns of African Americans. But I think that because of his independence, and his keen sense of justice and fairness, Judge Thomas looks at all sides of issues when others might be content to examine only one.

For example, Judge Thomas wrestles with the issue of individual rights when considering group entitlements because he knows that fairness and justice are not one-sided concepts. He struggles with the points of conflict between the principle of equality and the practice of affirmative action. But because of his open-mindedness, I believe Judge Thomas can be persuaded to see that in order to redress past discrimination, the concept of equity, rather than strict equality, must be applied. The Constitution speaks of equality, but it also speaks of justice, and under various circumstances, the principle of equity must be applied to insure that justice and fairness will be the end result.

Leaders must be understood in the context of the times that spawn them. This is as true of Judge Thomas as it is of others. As African Americans, we have been fortunate in having a long line of leaders who, in retrospect, seem right for their times. These leaders did not always have the same ideology or agree on strategies, but they all agreed that the goal was to secure freedom and justice for our people, and thereby help to insure freedom and justice for all. Who can say that we are not the better off for having had the benefit of their separate and distinct voices?

In the 1850s, there was Frederick Douglass fighting for the abolition of slavery, for voting rights for free blacks and for what we now call integration. But, there was also Martin Delaney, an equally strong abolitionist, who sought freedom and prosperity through economic and political linkages with Africa, including the establishment of African American settlements on the African continent. The legacy of Douglass is the fight for equal rights; that of Delaney, the struggle for economic empowerment for blacks in America and in Africa.

At the turn of the 20th century, there was Booker T. Washington speaking for vocational education for the masses, self-reliance in the black community, and co-existence with segregation. At the same time, W.E.B. DuBois advocated a liberal education for the "talented tenth", economic interdependence and an end to segregation. Booker T. Washington left us Tuskegee University, a healthy respect for black colleges and other black institutions, and an appreciation of the value of self-help. On the other hand, DuBois' legacy is that of the NAACP, admonition to "the talented tenth" to reach back to help the less fortunate, and the demand that America help those upon whose backs this country was built.

The decade of the 1920s saw the rise and fall of Marcus Garvey, the nationalist, who preached "Africa for Africans" and "Back to Africa", while envisioning a black-owned economic network spanning the Atlantic. In the same decade, A. Philip Randolph, the socialist, emerged as the leading spokesman for jobs and justice here in America. Both Randolph and Garvey were geniuses at mass mobilization and mass organization. Garvey left us a legacy of racial pride, and a commitment to cooperation among Africans "at home and abroad." A. Philip Randolph, who disavowed socialism and became one of the country's greatest labor leaders, taught us the effectiveness of direct action and planted the seeds for fair employment practices legislation.

In more recent times, there was Martin Luther King and Malcolm X, both committed to justice, equality and empowerment, but while Dr. King chose the path of integration, Malcolm chose separation, at least until near the end of his life. Both of them were taken from us in a flash, leaving a legacy of work unfinished and a job to be done.

Different leaders have "brought us thus far on our way." Different voices have spearheaded the crusade for freedom and justice.

Now, in the judicial arena itself, we see the great legacy of Thurgood Marshall, the brilliant architect of legal desegregation and the undefeated champion of civil rights. Thurgood Marshall--a man of and for his times.

Today, as we anticipate the appointment of Clarence Thomas to the Supreme Court, we see in him a leader with a different voice, for a different time. We who have put our faith and confidence in him, now come forth to challenge him to choose well the means by which he will carry on the quest for justice and equality. We ask him to be ever mindful of the words of Robert Hayden, the celebrated African American poet, who suggested that we must not rest until "it is finally ours, this freedom, this liberty...needful to man as air, useable as earth..."

Senators, Judge Thomas: As a nation we must not rest until Dr. King's dream becomes a reality. We cannot rest until we as a people have overcome.

# Thomas should be approved

By NIARA SUDARKASA

**T**he tide is turning in favor of Clarence Thomas in the African American community. What appeared at first to be an avalanche of opposition to his nomination to the Supreme Court is subsiding. This is not only because of the mobilization of the black conservatives. Many liberals and others in between are asking: If not Thomas, who?

As a registered Democrat who at different times has been labeled a nationalist, a radical and a liberal, I believe there are reasons that African Americans can and should support Clarence Thomas.

On this issue, as on many others, we are dealing with options that we do not control. It is unrealistic for us to expect (although we might wish) that the President will nominate someone who would carry on the legacy of Thurgood Marshall. He will appoint a conservative, male or female, white, black or Hispanic.

There is a special need on this court for someone who can reach back into his or her experiences to find the compassion, courage and

*He knows what it means to be black and poor. And African Americans can surely use a voice at the table.*

conviction to stand up for justice for those who are downtrodden, excluded or overlooked.

I believe Thomas would be such a person. He knows what it means to be black and what it means to be poor. His life shows him to be a man of courage, and his speeches and writings reveal his belief in equal justice.

The question is whether he understands that given a history of injustice and discrimination a commitment to equal justice requires a commitment to equity.

The concept of affirmative action rests on this premise. Much has been made of Thomas' opposition to affirmative action. Yet, the record shows that he supported it at certain times and opposed it at others. We know that he has been surrounded by conservative opinion that opposes affirmative action on the erroneous ground that it requires quotas. We need to be persistent in presenting Judge Thomas with the counter arguments as to what affirmative action is and what it is not and why it is important in redressing past discrimination.

History proves that Supreme Court justices can be persuaded to moderate their views. After all the segregationist political and intellectual climate of the early 1950s, the court decided in favor of Thurgood Marshall and the NAACP in the famous *Brown v. Board of Education* school desegregation case. In that landmark decision, several minds were changed by the power of the arguments they heard.

As African Americans, we have always fought for access, for a seat at the table, regardless of who else might be there to speak for us. We never said there was no need for Thurgood Marshall to be on the Supreme Court because the liberal majority might represent our views. Marshall's was a distinctive voice on a liberal court.

Thomas may not speak for the majority of African Americans, but he speaks for a growing number. Black conservatives deserve a voice on the court just as black liberals did. Thomas can be a distinctive voice, and hopefully a moderating influence, on this conservative court.

Why would I argue for an African American to replace Thurgood Marshall? Because if any voice is needed in those halls of justice, it is a voice for black people. Black men go to prison in larger numbers, get longer sentences and are executed more often than any other group in the nation.

The chances for equal justice for African Americans and all minorities in this country have improved markedly as more black lawyers and judges, conservative as well as liberal, have come into the legal system. They have made a difference through their own arguments and decisions, and by influencing their colleagues.

Diversity on the Supreme Court is important, whether the court is mainly liberal or mainly conservative. Of course race, gender and ethnicity must be taken into account in achieving that diversity. How else can we redress a situation where race and gender were used for centuries to exclude all but white males?

In the era of a conservative Supreme Court, Clarence Thomas is a known quantity. He is a bird in the hand. We do not know who might emerge from the bush.

Niara Sudarkasa is the president of Lincoln University.

# Don't Write Off Thomas

BY NIARA SUDARKASA

**W**hen the venerable historian John Hope Franklin speaks, I listen. When the NAACP takes a position, I usually agree. But not this time. I am not a conservative, but I, and many others like myself, are not convinced by the NAACP's and Franklin's view that Clarence Thomas's appointment to the Supreme Court would be detrimental to African-Americans. We see a greater risk in casting our lot with an unknown nominee whose record might be far worse.

What concerns me here is that Thomas might be opposed because "he does not speak for the majority of blacks." I am reminded of the time when some NAACP chapters led a campaign against the film "The Color Purple" because it did not "represent the black experience."

The movie was picketed at the box office, blasted in the press and passed over at the Academy Awards largely because some blacks decided this was not an acceptable portrayal of black life. Who were the losers? Alice Walker, who wrote the probing and compelling novel, the movie's outstanding cast, led by Danny Glover, Whoopi Goldberg, Oprah Winfrey and Margaret Avery, and Steven Spielberg, the film's producer-director. But the biggest loser was the black community, because we denied our own the chance to be honored for their artistic achievements. And why? Because we could not allow a fictional work to be judged as fiction. We had to judge it as a historical treatise.

I wonder what would have happened to "The Godfather" if the Italian-American Civil Rights League, which had objected to some aspects of the film, had opposed its nomination for the Academy Awards because it "did not represent the Italian experience." "The Godfather," with its three Oscars, is remembered as one of the great movies of recent decades. "The Color Purple," with 11 nominations and no Oscars, has been pushed aside as a "controversial film."

The reaction to Clarence Thomas's nomination to the Supreme Court is analogous to what happened to "The Color Purple." Of course, the two situations differ in substance, importance and impact. But in both cases, there is a presumption that there can be only one valid interpretation of the African-American experience. More than anyone, we should understand the potential value of a minority point of view.

Thomas may not speak for the majority of black people, but his voice, his views and his experiences are those of many African-Americans who "came up the hard way." This is not to say that everyone who grew up poor ends up a conservative. I was born in Florida to a teenage mother who picked beans, scrubbed floors and worked in a dry

cleaner most of her life to send her four children to college. My grandparents' home, where we grew up, had no plumbing or electricity until the house was literally moved into town from the countryside. Before that, we used an outhouse, drew water from a well, bathed in a tin tub in the kitchen and lit the house with kerosene lamps. That was not uncommon in the rural South in the '40s and '50s.

I do not share Thomas's political views, but they are the views of many people who grew up with me. Liberals need to listen and learn from conservatives, just as conservatives can learn from liberals.

**Sense of self-worth:** Many complex experiences made Clarence Thomas a conservative. His way may not be our way, but that does not mean it cannot produce results. His ambivalence toward affirmative action, for example, could lead to a search for an alternative approach to providing equality for African-Americans and others.

Those of us who went to college in the '50s, before there was affirmative action, welcomed this federal initiative of the '60s as a means of helping deserving black students get into college. But we did not experience affirmative action from the point of view of the student—as Clarence Thomas and his peers did. I recall many of my students at The University of Michigan resenting the notion that they did not make it to college on their own merit. They suffered slurs

and innuendoes from faculty as well as other students. Although they appreciated the opportunity for an education, they felt there had to be a better way of opening the door. I would guess that today many of them have mixed feelings, if not wholly negative feelings, about affirmative action.

Those of us in my generation who entered college without affirmative action

**'More than anyone, we should understand the value of a minority view'**



should stop and think about how much pride we take in that fact that "we made it on our own" (although we too had help), and how much that affects our own sense of self-worth.

As African-Americans, we have always fought for access to America's institutions of power and influence. We demanded representation regardless of who was sitting at the table. When we raised our clenched fists in the cry for "black power," I don't think we meant power for black liberals only. Thomas should not be barred from serving on the Supreme Court because he does not speak for the liberal black leadership or what we think is the majority of black people. The fact that he speaks for many blacks, including a growing number of black leaders, should carry some weight.

We know that with or without Thomas, this conservative Supreme Court will no longer interpret civil and individual rights as the court has done over the last three and a half decades. Thomas's background and experience could make him a moderating influence and a distinctive voice among his conservative peers. His appointment would represent a personal triumph over poverty and racial discrimination. Many in our community would see his success as a victory for us. As African-Americans, we can live with Clarence Thomas on the Supreme Court. Let this not be a repeat of the "The Color Purple" episode, where we all end up losers.

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COMMENT

## Taking care of our own isn't new

### Conservatives, liberals share common ground in promoting self-reliance

Clarence Thomas' nomination to the Supreme Court has brought a number of issues out of the closet. One of the most hotly debated is whether or not a serious and successful program to uplift the African-American community can be built around a strategy of self-help.

In other words, can the African-American community realistically be expected to pull itself up by its bootstraps?

The new black conservatives seem to answer a resounding yes. The liberal black leadership asks what about the people who have no boots.

The new black conservatives view economic empowerment through self-help as the key to most doors that are still closed to us. Black liberals contend that self-help will not get us very far without government assistance and changes in the laws and practices that have kept the doors of opportunity closed to African-Americans for all these years.

Obviously, this does not have to be an either/or proposition. Self-help and government support are both necessary if African-Americans are to achieve justice and equality in America.

We cannot allow the government to ignore poverty and suffering. There must be government programs to help the poor and the needy. But we also must help ourselves to break the cycle of dependency by working toward economic and political empowerment based on



**SELF HELPERS:** Booker T. Washington, left; Mary McLeod Bethune and Malcolm X preached self-help before Clarence Thomas

self-reliance and self-help.

Liberals should not disavow the notion of self-help, just as conservatives cannot claim exclusive right to it. Black churches, lodges, sororities, fraternities and other institutions are rooted in self-help. Black colleges were founded to enable an educated black citizenry to reach back and help "uplift the race."

Welfare programs as we know them have existed less than 50 years, and they serve only a fraction of the African-American community. For over 3½ centuries, we have survived and prospered in America mainly because of our own hard work and the help of our extended families and other institutions.

Hundreds of our leaders, from the most conservative to the most radical, built organizations and institutions to promote self-help. Booker T. Washington, Marcus Garvey, Mary McLeod Bethune, Elijah Muhammad, Father Divine, Malcolm X, Adam Clayton Powell and Leon Sullivan immediately come to mind.

In the late '60s and early '70s, the Black Panthers, black nationalists and other "radicals and militants" launched many self-help initiatives, including breakfast programs for needy children, "buy black" campaigns, independent black schools and after-school tutoring programs.

Today, the ideology of economic empowerment through self-help appeals not only to black conservatives but to African-Americans across the political and economic spectrum.

In fact, black conservatism and

black militancy are once again converging around the issue of empowerment through self-help. Many of its younger advocates see themselves as militants in the tradition of Malcolm X. Others are young professionals who want to be entrepreneurs and executives — not just token black faces in the white corporate world.

The civil rights movement's focus on breaking down legal and political barriers to integration does not sufficiently address the concerns of this new current in the black community. If the civil rights leaders do not give high priority to self-help and empowerment, they will be perceived as perpetuating dependency and, in time, will lose the support of the majority of African-Americans.

Twenty-five years ago, the cry of "black power" by Stokely Carmichael (now Kwame Toure) and the Student Nonviolent Coordinating Committee pushed the civil rights movement to a new level of militancy and ushered in a period of radicalism throughout the black community. The call for economic empowerment and self-help now coming from conservatives and militants may once again force the civil rights movement onto a new course, or bring about an entirely new "rights movement."

In either case, black conservatives as well as young militants will be there to challenge the liberal civil rights establishment for the leadership of the black community as empowerment rather than integration becomes the primary goal.



By Niara Sudarkasa, president of Lincoln University in Pennsylvania.

The CHAIRMAN. Thank you very much.

Senator THURMOND.

Senator THURMOND. Thank you, Mr. Chairman.

I have to leave for another appointment in just a minute. I first want to take this opportunity to welcome all of the witnesses here today. Sister Virgilius, Father John Brooks, Judge Gibbons, and Dr. Sudarkasa, we are honored to have you here.

Now, your statements carry great weight with me, because you know Clarence Thomas, you have known him for years. You know his character. You know his ability. You know his dedication. You know his temperament. I want to thank you for coming here today.

Now, I just have two questions I want to ask each one of you. There is no use taking a lot of time, because this is the essence of it, and I will start with you, Sister. Is it your opinion that Judge Thomas is highly qualified and possesses the necessary integrity, professional competence and judicial temperament to be an Associate Justice of the U.S. Supreme Court?

Sister VIRGILIUS. Most certainly.

Senator THURMOND. Your answer is yes?

Sister VIRGILIUS. Yes.

Senator THURMOND. Father Brooks.

Father BROOKS. The answer is yes.

Senator THURMOND. The answer is yes. Judge Gibbons.

Mr. GIBBONS. My answer is yes.

Senator THURMOND. The answer is yes. Dr. Sudarkasa.

Ms. SUDARKASA. Yes.

Senator THURMOND. The answer is yes.

The second question is: Do you know of any reason why he should not be made a member of the Supreme Court? Sister?

Sister VIRGILIUS. No.

Senator THURMOND. The answer is no.

Mr. BROOKS. No.

Senator THURMOND. The answer is no.

Mr. GIBBONS. No.

Senator THURMOND. Judge Gibbons, the answer is no.

Dr. Sudarkasa.

Ms. SUDARKASA. No.

Senator THURMOND. The answer is no.

Thank you very much for your appearance. We appreciate you coming.

The CHAIRMAN. Thank you.

Father, let me ask you a question: What policy does Holy Cross have now for attracting blacks to Holy Cross?

Father BROOKS. We operate administratively under a mandate from the board of trustees to conduct an aggressive and vigorous recruitment of African-American students, in fact all minority students, so it is communicated, particularly to our admissions office and to other administration of the school, that they are to go out into the field, to exercise their judgment and to try to find as many African-American students as we possibly can who would be attracted to Holy Cross and about whom they make the judgment that they are capable of competing successfully at the college.

The CHAIRMAN. Assuming they find African-Americans who are capable of competing at Holy Cross College, does that mean they will be admitted?

Father BROOKS. If they meet the positive judgment of the admissions boards, they are certainly admitted.

The CHAIRMAN. Now, assuming you find white Americans who are qualified, does that mean they will be admitted?

Father BROOKS. No. Going back to what you were discussing earlier, the lawyers panel, there are a number of students who are applicants Holy Cross, certainly well qualified, and are denied admission.

The CHAIRMAN. Judge Gibbons, are you still on the board of Holy Cross?

Mr. GIBBONS. I was until September 6 last.

The CHAIRMAN. Did you support that policy when you were on the board, Judge?

Mr. GIBBONS. Yes, very positively.

Senator SIMON. Would you pull the microphone a little closer to you?

Mr. GIBBONS. Yes, I was a strong supporter of it.

The CHAIRMAN. Is it fair—

Mr. GIBBONS. So was Clarence Thomas.

The CHAIRMAN. Is it fair to refer to that as affirmative action? What would you call it, Judge, as a judge, knowing the law as you do and unwilling to slide out from under the question?

Mr. GIBBONS. It is affirmative action. We take affirmative steps to increase the percentage of minority enrollment in the school.

The CHAIRMAN. And it means that if there is a white student and a black student, equally qualified, and one place left in class, it goes to the black student, correct?

Mr. GIBBONS. Very likely.

The CHAIRMAN. I compliment you on the policy.

Mr. GIBBONS. Thank you.

The CHAIRMAN. I think it is a wise policy.

Mr. GIBBONS. Of course, it is a private institution.

The CHAIRMAN. I understand it is a private institution. I might say, my experience with Jesuit institutions is that this is uniformly the case; I have a son who goes to a sister institution that I am not allowed to mention here, but which happens to be in town.

Now, let me ask you, Judge, I have never heard anyone refer to Clarence Thomas as "a legal positivist."

Mr. GIBBONS. No, I referred to Robert Bork as a "legal positivist."

The CHAIRMAN. I see. OK. I thought you said—that clears it up. Thank you very much.

Sister, if Judge Thomas had a view of the Constitution you did not like, you would still be for him, wouldn't you?

Sister VIRGILIUS. I sure would.

The CHAIRMAN. That is right. God bless you. Thank God for loyalty. [Laughter.]

I yield to my friend from Utah.

Senator HATCH. I want to compliment each of you for what really were collectively eloquent statements for and on behalf of Clarence Thomas. I think he was very fortunate to have you, Sister

Virgilius, as one of his early teachers, and he says so. He dearly loves you.

Father, I am well aware of Holy Cross and I think that you do a terrific job up there. I have known Judge Gibbons for a long time and he has been a great jurist in this country and I have great respect for him.

I have to say, Dr. Sudarkasa, that was as eloquent a statement as I have ever heard for a judicial nominee, bar none, the Supreme Court or otherwise. So, I was very impressed with everything that you folks said.

The only thing I would ask is do each of you agree with Dr. Sudarkasa that this man will be an advocate for equal and civil rights, while on the Court?

Mr. GIBBONS. I have no doubt.

Senator HATCH. You have no doubt about that.

Mr. GIBBONS. None. In fact, from reading his opinions, I suspect that, with respect to the rights of criminal defendants, his addition to the Court may result in a net improvement of its jurisprudence.

Senator HATCH. That is interesting, because I believe that he will be very broadminded with regard to the rights of those who are accused, as well.

The CHAIRMAN. Do not scare Senator Hatch off now, Judge. [Laughter.]

Senator HATCH. Actually, Chairman Biden and I are not too far apart on some of these issues. It scares him sometimes.

I do not want to take any more time. I was just impressed with all of your testimony. I think Judge Thomas is very fortunate to have four people like yourselves testifying for and on his behalf. Like Senator Thurmond, I give great weight to the testimony of those who know him, not just those who posture what they think he is.

I know him, too, and my experience is very similar to the experience of all of you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Simon.

Senator SIMON. Thank you very much. We thank the panel.

First of all, Sister Virgilius, you mentioned that Judge Thomas said "thank you" to teachers, that is one of the things that most of us don't do. Once in a while I will speak to a Rotary Club or some group, and they will ask: What can we do to raise the standard of teachers and encourage more young people to go into teaching? And I will say, "How many of you have ever thanked one of your teachers?" Hardly ever is a hand raised. I appreciate that.

One of the problems we have, those of us who are struggling with this nomination, is to sense where he is going. Sister, you have been sitting in on a lot of these hearings. Do you recall ever discussing abortion or any of the other issues that have been discussed here with Judge Thomas?

Sister VIRGIlius. I think Judge Thomas is a man of his own convictions, and he will make up his mind according to what he thinks and knows is best according to the Constitution. I spoke to him during the summer, around the beginning of August, and I asked him what he was going to do. And he said, "I am going to continue

to study constitutional law." And knowing Clarence Thomas, with the mind he has, I think he has done that, and he will do it.

Senator SIMON. But in terms of discussing any of these specific issues that have arisen here, do you recall having any discussions with him?

Sister VIRGILIUS. Well, at one time we were discussing affirmative action, and his reaction was—well, he did not—what he wanted was a helping hand, not a handout. I think that is his idea.

We have got to help ourselves. We cannot depend on anybody else. It has got to be our own doing. Granted, we get help from others, but we cannot wallow in our own misery and say, you know, everybody else is against me. That is not the Clarence Thomas I know.

Senator SIMON. Father Brooks and Dr. Sudarkasa, let me just say I hope we will be moving soon in reauthorization of the Higher Education Act. That will be a significant lift to students and to the country. I hope we do more than just tinker at the edges of the reauthorization.

But, Father Brooks, one of the things that concerns me is that I see two Clarence Thomases: one the Sister is talking about, the one at Holy Cross; and then I see the record as a Federal official where he has sided too often, from my perspective, on the side of the privileged rather than the less fortunate.

One of the questions that came up was the question of his position on South Africa, and let me quote from an article by David Corn, because Judge Thomas mentioned that while serving on the Holy Cross board he had supported divestiture. And it says:

The Reverend John Brooks, the school's president, said there was no significant board opposition to Brooks' recommendation for divestment, and that he does not recall Thomas or anyone else taking or needing to take a strong stand.

First of all, I commend you for making the recommendation. Is this an accurate portrayal here?

Father BROOKS. No, that is not an accurate portrayal. I believe that is the same quotation I heard you speak of on television a few days ago.

Senator SIMON. That is correct.

Father BROOKS. Therefore, the obvious question is where did you get it from, and I had to conclude that it probably came from a reporter who had spoken with me just a day or two prior to that.

The reporter's quest was to try to find out rather quickly in a phone conversation, whether or not Clarence Thomas placed the question of divestiture on the agenda of the board of trustees, and then how he voted for it, what the discussion was like around the board table, and what the vote was at the end of that. In an effort to complete my phone conversation with the reporter, I tried to describe for him how the debate would go.

First of all, I made it very, very clear that the item was placed on the agenda by myself. I, working with an executive committee, work out a final agenda for a board meeting. I did tell him that Clarence participated in the discussion. I told him that we don't take votes at the end and we don't end up 13 to 12 or whatever it might be, but rather after a lengthy and a heated and a vigorous

debate, there is generally a consensus reached and the board ceases the discussion at that point, and the consensus is taken as decision.

And that is precisely what happened at that meeting. The meeting was a vigorous meeting. There were strong positions taken on both sides. But eventually a consensus was reached, and at least some of us were able to get what we wanted out of that particular meeting.

Senator SIMON. Judge Gibbons, you were on the board then, I assume.

Mr. GIBBONS. I presided at the meeting in the absence of the chairman.

Senator SIMON. And could you pull that mike a little forward and give your recollection of the meeting?

Mr. GIBBONS. Yes. I presided at the meeting in the absence of the chairman, and my recollection of what transpired and Clarence Thomas' role in it is exactly as I have stated here. The press report that you read is not an accurate description of what took place at the meeting.

There was a vigorous debate over the difference between the Sullivan principles approach and the total divestiture approach, and Clarence Thomas firmly and persuasively argued for total divestiture.

Senator SIMON. If I can ask either one of you, how do you mesh that with his position in opposition to sanctions, serving 10 years on the board of a publication that regularly ran articles taking the position of the South African Government? And yet in his testimony there was no indication that he ever protested those articles—may I just ask how either of you feel about that and how you can mesh those positions, or, well, your thoughts on that.

Father BROOKS. I think the position on the divestiture is based on his understanding of the immoral nature of the Government of South Africa at the time. I really can't—I just don't know. I don't know what motivated him, and I don't know the circumstances under which he wrote the articles, gave the talks, and so forth. I really don't think I can be of much help to you on that.

Senator SIMON. Judge?

Mr. GIBBONS. Nor can I. I was never even aware of it, and he certainly never discussed it at the board meeting. But his position on divestiture was quite clear.

Senator SIMON. I thank you all very much.

I yield to my colleague from Pennsylvania.

Senator SPECTER. I join my colleagues in welcoming you here and thank you very much, Sister Virgilius, and you, Father Brooks, for your personal insights and your knowledge of Judge Thomas.

Dr. Sudarkasa, I note an article which you had written for Newsweek, in August, on the issue of affirmative action. And you say you were not a conservative, but you applaud Judge Thomas' approach on affirmative action. And you raise an interesting point on those who got into college when you went without any affirmative action, knowing that you had "made it on our own," and the concern about students who got in on affirmative action resenting the notion they did not make it to college on their own merit.

Is your net conclusion that there ought not to be any preferences on college admission?

**Ms. SUDARKASA.** I appreciate your asking the question because I think my position really is not clearly understood.

First of all, for 3 years at the University of Michigan, I had the responsibility of advising the university on the implementation of its policies that would give equitable admission to African-American and other minority students. I have not actually identified myself with Judge Thomas' position on affirmative action. As a matter of fact, in the statement I just gave, I said that I think that he has to understand that while looking at the tension between the practice of affirmative action and the principle of equality, that there is also the issue of equity which has to prevail if one wants to remedy past discrimination.

What I tried to point out in the Newsweek article, however, is that while I have a different position from Judge Thomas' on affirmative action, I understand how he and many of his generation come to the positions they hold. Because when I was a professor of anthropology and associate vice president at the University of Michigan, many students came to me with brave concerns about the way they were being treated by their peers, as well as by faculty members, because of the perception that they came into the university on something other than their own merit.

And I make the point that—well, not in that particular article, but in another. Affirmative action is a little more than two decades old, let's say a quarter of a century old. There is nothing sacrosanct as the only means by which we can attain equity and justice for those who have been discriminated in this society. I believe firmly that there must be a redress for past discrimination.

However, I think that if we listen carefully to the critics of some aspects of affirmative action practice, we may be able to improve upon that particular means of access. It is not simply that one is either for affirmative action or against it. One can be for affirmative action and still seek out ways to improve it.

**Senator SPECTER.** Well, in what you are articulating, you say there should be a remedy for past discrimination, in your words, "a redress for past discrimination," which is somewhat different from Judge Thomas.

**Ms. SUDARKASA.** Right.

**Senator SPECTER.** But you believe that Judge Thomas' views are well within the ambit of acceptability from the point of view of the African-Americans. Would you advocate the same kind of equity, equitable practices for employment as well as for educational practices?

**Ms. SUDARKASA.** Yes, I do.

**Senator SPECTER.** Judge Gibbons, welcome here. You had a very distinguished career on the Court of Appeals for the Third Circuit. You spent a lot of time in Pennsylvania on the court, which had jurisdiction over Pennsylvania, New Jersey, and Delaware, and I was very interested in your statement. And you come down to the core issue in your statement when you refer to the dilemma of when should the Court exercise the awesome power to set aside laws enacted by popularly elected legislators.

In the course of this hearing, I have gone into some detail on Judge Thomas' stated conclusions as to Congress is not a deliberative body and there is not wisdom here, and in taking up some

major cases like *Johnson v. Transportation Department of Santa Clara County*, saying that he hoped that Justice Scalia's dissent would provide a majority view in the future, although he expressly recognized the capacity of the Congress to change the law which the Supreme Court upheld in the *Johnson* case and also in other cases.

Would you be confident that Judge Thomas will respect the legislature's role and will not make law as a Supreme Court Justice but only interpret law on that delicate dilemma which you articulate in your statement?

Mr. GIBBONS. I think you have asked two things. There are some areas in which Supreme Court Justices do make law. They make constitutional law. I think we have to acknowledge that, and an effort to say that they merely find it is somewhat unrealistic.

With respect to whether or not he will show due deference to the legislative branch, I think the best reassurance you have is in the 20 published opinions he has written. They show an appropriate reliance on precedent and a fine appreciation of the deference the courts owe both to Congress and to the administrative agencies, and they show a reading of Federal statutes which properly acknowledges the primacy of the legislative process.

I am convinced he will show as a judge due deference to the legislative policy judgments made by the Congress.

Senator SPECTER. Well, Chief Judge Gibbons, when you talk about the Supreme Court making the law in the constitutional sense, I wouldn't quarrel with you. But when you deal with some of the cases that we have talked about here and you have title VII of the Civil Rights Act, which is a legislative determination, and you have the Supreme Court deciding one interpretation, as they did in *Johnson*, or as they did in local 28, the union, and then Judge Thomas specifically says that he knows that the Congress has demurred on not changing the law, but then criticizes it.

I would be interested—I have read all of his opinions, too, and the opinions of the panel when he wasn't writing them. I would be interested to know if you saw any of those opinions—because, candidly, I did not—where he dealt with this issue about deferring to legislative judgments even though he had a different personal view.

Mr. GIBBONS. No, none of them dealt with that issue specifically. But his general approach to congressional enactment, it seems to me, was consistent with an appropriate deference.

Senator SPECTER. Did you see any of that in his opinions? Because in his writings—and I am not saying I weigh too heavily his writings, but his writings were to the contrary. But did you see some of that in his opinions?

Mr. GIBBONS. Just his general approach. I have them all in the briefcase, but I am sure you don't want me to pull them out and start reading them.

Senator SPECTER. Well, you and I might do that together on another occasion when we don't have so many other witnesses to hear.

One final question, Chief Judge Gibbons, and that is: You heard the American Bar Association evaluate him as qualified as opposed to well qualified. As you state your knowledge of this man over a long period of time, having had dealings with him on the Holy

Cross board, and I can personally attest to your capacity to evaluate lawyers, judges, having known of your work in some detail, would you rate him well qualified for the Supreme Court?

Mr. GIBBONS. I personally would, and indeed, I said as much to the representative of the American Bar Association who called me.

Senator SPECTER. Thank you very much, Chief Judge Gibbons. Thank you, ladies and gentlemen.

I yield now to my colleague, Senator Brown.

Senator BROWN. Mr. Chairman, I have long waited for you to become chairman of this committee. I have a motion for the adoption of constitutional amendments for the balanced budget and line-item veto and term limitation. [Laughter.]

Senator SPECTER. Without objection, agreed to.

Senator BROWN. Thank you.

Senator SPECTER. And now, Senator Brown, with my departure, you are the Chairman. [Laughter.]

Senator BROWN. Judge Gibbons, we have heard from a number of witnesses and some distinguished scholars today about how Judge Thomas might rule on the Court. They made a number of observations, but several of them were very serious charges. These scholars had not had an opportunity to read any of Judge Thomas' cases. My understanding is that you have read all of his decisions while he has been on the Circuit Court of Appeals. Would that be correct?

Mr. GIBBONS. Yes.

Senator BROWN. In those decisions, do you find that he has relied on natural law in any of those decisions?

Mr. GIBBONS. No.

Senator BROWN. Some of these scholars—

Mr. GIBBONS. I might say that none of them presented any occasion where that would be likely, since most of them dealt with statutory issues.

Senator BROWN. In reviewing the Judge's writings, they indicated they found and believed that he would follow a very simplistic approach, see things and be unable to grasp the complexities of issues that might come before the Court. Having read his cases, and I assume some of his other writings, could you give us your view of whether or not that would be his approach to constitutional questions?

Mr. GIBBONS. I do not think in adjudicating constitutional issues it is possible for just to take simplicity issues. They are dealing with cases that are intensely litigated and they are decided at the end of the litigation process. The competing considerations are usually well developed and it is hard in a collegial body of nine Justices or even in the court of appeals, where the typical panel is three, to take a simplistic approach. Your colleagues on the bench will not let you, you have to engage in a rigorous intellectual effort for which you have become fully prepared by studying the relevant materials.

I am fully confident that he will engage, as a member of the Court, in the kind of internal debate that is necessary for the intelligent moral resolution of complex constitutional issues, many of which cannot be determined on the basis of facts.

Senator BROWN. Thank you.

Father Brooks, how would you characterize Clarence Thomas as a student?

Father BROOKS. Clarence was an excellent student. He pursued his academic life very, very seriously. He was very deliberative in terms of selecting courses, selecting his major, and he was well known throughout the college community as being very, very serious about his studies and was very successful at them, also.

Senator BROWN. Thank you. We are advised that Holy Cross has sought out through a recruitment program a diversity of ethnic groups to join the student body. If Clarence Thomas was not black, knowing him as you do, would he have been a student, would he have been admitted to Holy Cross?

Father BROOKS. I think he probably would have, for this reason: He was really not the object of our recruitment effort. I was very instrumental in the early days of Holy Cross' involvement in minority recruitment, and he was not among the students whom we identified. In fact, he came to Holy Cross—I think perhaps Sister knows more about it than I do—I think he came as a result of advice he received quite likely from Sister or some other teacher he had earlier in school. His academic record, the seminary he had been attending the previous year was very, very good, and he would have got in any under any set of circumstances, in terms of his academic achievement.

Senator BROWN. Thank you.

Sister, do you have anything you would like to add to that?

Sister VIRGILIUS. Yes. When Clarence was in the seminary in Savannah, our Sister Mary Carman taught him chemistry and physics, I think, but she was the one who encouraged him to go to Holy Cross, as well as Father Dwyer, and several of the high school children are pupils of Savannah, are graduates of Savannah, like William Douglas and Carleton Stewart, who were also graduates of St. Benedict's School, they have gone or were in Holy Cross or have graduated from Holy Cross, so I think it was something like that that attracted him to Holy Cross, where he would meet some more of his former Savannahans.

Senator BROWN. Thank you.

One last question that I would appreciate comments from each of you, if you care to comment: Throughout this last week, the Judge has received intensive questioning, which is obviously the duty of this committee, but many of the observations that have come down from folks who I think could be fairly described as somewhat skeptical of Clarence Thomas, and evolved to a charge that Clarence Thomas simply is not being honest.

I would appreciate knowing, as people how know Clarence Thomas, have seen him in action, your assessments of his integrity and his honesty.

Sister VIRGILIUS. As far as I am concerned, Senator, Clarence Thomas is perfectly honest, and I have watched at home at the convent in Tenafly before I came down here to Washington on Monday, and I have watched and I think he stood up very well under the interrogation, he was very articulate and I think he handled himself very well, and I do not in one instant mistrust his honesty. I think he is perfectly honest, knowing Clarence from a child.

Father BROOKS. In more than 20 years, I do not think I have experienced a shred of evidence of any dishonesty or even lack of candor in Clarence Thomas. I have always found him very forthright, very clear in what he is saying to me and very cooperative. There is not a shred of dishonesty in him, I do not believe.

Mr. GIBBONS. That is my reaction exactly. In less than 20 years, more like 15 years of dealing with him, I have found him to be a completely honorable person in all of his dealings with me and with others. I think, Senator Brown, the suggestion to which you refer is that he has undergone some kind of a conversion to obtain confirmation. I do not believe that for a moment. It is perfectly clear that his lot here would have been a lot simpler, if he had simply said, well, if I am confirmed, I will not vote to overrule *Roe v. Wade*.

The CHAIRMAN. I can assure you that would not be true. You would find an eruption on this side of the table similar to the one you found on that side of the table, and you know that not to be the case, Judge.

Mr. GIBBONS. But then he could count the votes. [Laughter.]

Ms. SUDARKASA. Senator, may I just say that I, unlike my colleagues here, am not a longstanding acquaintance of Judge Thomas. I joined this panel, because I was not able to stay for the afternoon. But I am a person who came to my assessment of the Judge, having read his speeches. I am not a lawyer, so I did not read all of the cases that have been referred to, but I read almost everything I could find about Judge Thomas, and I think that his observation early in the hearing is the appropriate one, namely that, before people knew who he was, they had made up their minds that Judge Thomas fit into one mold or the other. And I think that seeing the real person, who always came across to me as someone groping for answers to very tough questions, seeing the real Clarence Thomas simply put some people off-guard.

I do not think that he was dishonest. I think that where he had reservations about giving his opinions, he expressed those, despite vigorous questioning, and where he felt it was appropriate to give those views, whether they were ones that he held in 1974 or ones that he had come to more recently, he gave them, so I thought that he was very forthcoming.

Senator BROWN. Thank you. I guess I have come to notice this, because or a charge or at least a concern was raised that he had undergone some change of heart with regard to the use of natural law in that he did not now advocate it as a means of interpreting the Constitution. But in reviewing the cases, it appears to me that he has been totally consistent with that view in the cases that he has written, and I think, surprisingly to some members of the committee, the fact is he said exactly the same thing about not using natural law when he was up for confirmation for the Circuit Court of Appeals, in terms of conversion.

I do not know what kind of conversion this committee could induce. I suspect it would be not an angelical conversion, it might be one more akin to the Spanish Inquisition, but I doubt that, with a benign charming chairman as we have, I suspect even that conversion would not be available to this committee.

Mr. Chairman, we passed three constitutional amendments in your absence. In addition to that, I would like unanimous consent to have a brief statement put in the record that does not relate to the legislation, but merely this hearing.

The CHAIRMAN. Without objection, it will be placed in the record. [The statement referred to follows:]

#### LINCOLN REVIEW

Mr. Chairman. In 1981, Judge Thomas was invited to join the Lincoln Review's Editorial Advisory Board. He accepted. However, I don't believe he attended any meetings or reviewed or edited any manuscripts. In 1990, he requested that his name be removed from the Advisory Board. Mr. J. Parker recently wrote to Judge Thomas confirming that his name had been removed from the Advisory Board. As well, he said, and I quote, "authors alone are responsible for their articles. Views expressed . . . are not necessarily those of (Lincoln Review)."

Mr. Chairman, I believe that it would be very misleading to hold Judge Thomas responsible for the views of authors who had materials published in the Lincoln Review that Judge Thomas neither reviewed or approved.

The CHAIRMAN. I will note that neither Sister nor Father took offense at the reference to the Spanish Inquisition. [Laughter.]

Sister, you are going to get a lot of letters, I can tell you. Do you know what the letters are going to say? Why did you all send Clarence to the Cross, instead of Notre Dame or Georgetown? That is what you will find. I just want you to know, be prepared.

Is the nun who recommended Holy Cross alive and well?

Sister VIRGILIUS. She is one of our Sisters. She is Sister Mary Carman, and she works in pastoral ministry in Binghamton, NY.

The CHAIRMAN. You should not have done that. She is going to get all the letters now, I will tell you.

Sister VIRGILIUS. I know Carman.

The CHAIRMAN. Again, I thank you all very, very much.

Judge I would like very much sometime to discuss with you—I will not take the time now—about Judge Thomas' writings on natural law, about which you know a good deal. I would like to discuss the judicial application of the process and how there is no way to distinguish between saying one is considering the Framers' view of what they thought to be natural law and how natural law is applied in the first instance, since this is a subjective application. Maybe, if we had more time, we could speak to the committee about that in the future.

I want to thank you all very, very much. Judge Thomas is indeed fortunate to have you as friends and acquaintances.

Thank you very much.

Our next panel will be two extremely distinguished lawyers representing the Lawyers Committee on Civil Rights Under Law. Probably one of the most distinguished lawyers and law school deans in this country today is Erwin Griswold, former Solicitor General and former dean of Harvard Law School and currently a senior partner at the firm of Jones, Days, Reavis and Pogue; and William Brown, cochairman of the Lawyers Committee on Civil Rights Under Law. I welcome both of you. It is a pleasure to have you here.

Dean, it is a pleasure to see you again. Mr. Brown, you are very welcome to be here, and we are anxious to hear what you both have to say.

I will leave it to you since, as I understand it, you are both representing the Lawyers Committee Under Law. Is that correct?

Mr. BROWN. That is correct.

The CHAIRMAN. You just tell the Chair how you wish to proceed and in what order.

Mr. BROWN. I believe I will make the initial statement on behalf of the Lawyers Committee, followed by Dean Griswold.

The CHAIRMAN. Thank you very much. You go right ahead, Mr. Brown.

**STATEMENTS OF A PANEL CONSISTING OF WILLIAM H. BROWN, ON BEHALF OF THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND ERWIN N. GRISWOLD, ON BEHALF OF THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

Mr. BROWN. Mr. Chairman and Senators, my name is, as has been indicated, William H. Brown III, and I am cochairman of the Lawyers Committee for Civil Rights Under Law.

Dean Erwin N. Griswold and I are here today on behalf of the Lawyers Committee. Ninety members of our board of trustees and 66 directors and trustees of local lawyers committees have submitted a statement urging the members of this committee to oppose Judge Clarence Thomas' appointment as an Associate Justice of the Supreme Court of the United States.

We have also submitted the concurring statement of one board member and three dissenting statements signed by a total of eight board members.

The Lawyers Committee for Civil Rights Under Law is a bipartisan legal organization established in 1963 at the request of President John F. Kennedy to enlist the assistance of the private bar in the enforcement of civil rights.

Judge Thomas has rejected much of the decisional framework on which our Nation's protection of civil rights is based. He has argued for a limitation of the disparate impact principle enacted by Congress in 1964, recognized by Chief Justice Burger for a unanimous Court in *Griggs v. Duke Power Company*, and reaffirmed by Congress in enacting the Equal Employment Opportunity Act of 1972. He has disagreed with the legal theories and evidentiary bases necessary to challenge systemic discrimination and has opposed the temporary race- and gender-conscious remedies the courts have often held to be necessary in providing effective relief for systemic discrimination. Regrettably, we have not found the depth of analysis we must expect and the Nation should require of any nominee for the Supreme Court, especially one who proposes a rejection of the hard-won legal foundation for established protections for equality.

In this regard, it is not enough that the nominee has repudiated before this committee so much of the thought and conclusions to which he laid claim prior to his nomination. This committee now has nobody at work on which to base its judgment of the nominee's own judgment. A critical point is that although *Griggs* and even *Wards Cove* agree that an exclusionary practice should not simply be assumed to be proper and that evidence to show its propriety is necessary, Judge Thomas has criticized this requirement as assum-

ing some inherent inferiority of blacks, Hispanics, and other minorities and women by suggesting that they should not be held to the same standard as other people.

His reference to even this remaining common ground between *Griggs* and the later decisions in *Wards Cove* as outside the plain meaning of the term discrimination necessarily raises the question whether he continues to accept this basic premise of *Griggs* or whether he would even go further than *Wards Cove* and abolish the disparate impact standard altogether. Judge Thomas' criticism of *Griggs*, the guidelines, and the proper use of statistical proof represent a radical, unexplained departure from his early endorsement of these tools for approving and remedying discrimination.

On affirmative action, the bottom line with respect to Judge Thomas' alternatives for affirmative action is that they are not alternatives. They reach proven cases of intentional discrimination against identified victims, but much of what is considered to be discrimination today in this country under existing law cannot be proved under that standard or does not constitute that type of discrimination, including most disparate impact employment situations.

There is much legitimate concern, and Judge Thomas expresses such concern, over what are appropriate affirmative action remedies in a particular case of proven discrimination, or in the settlement of discrimination claims, or in legislation providing for minority set-asides. The tailoring of equitable relief in this area must truly be equitable, and that is an enormously difficult task. Judge Thomas' answer is to do away with the remedy entirely, and that strikes at the very heart of established civil rights jurisprudence long recognized by the Congress, successive administrations, and the courts.

Judge Thomas has criticized most of the judicial and statutory building blocks for the protection of civil rights in this country, not only admittedly controversial and difficult court decisions and governmental policies, but also those widely accepted as fundamental to the protection of civil rights for every American. Judge Thomas has also attacked the Court and the Congress for their role in laying down these building blocks, arguing instead for a limited Government that would leave Americans with rights but uncertain remedies or no remedies at all for violation of those rights.

Moreover, we believe that Judge Thomas' changes of position with respect to matters of fundamental importance do not demonstrate the reflection before reaching important conclusions which is essential in a Justice of the Supreme Court. We urge the Senate not to confirm this nomination.

[The prepared statement of Mr. Brown follows:]



LAWYERS' COMMITTEE  
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BEFORE THE COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

September 17, 1991

TESTIMONY OF WILLIAM H. BROWN ON  
NOMINATION OF JUDGE CLARENCE THOMAS

I. Introduction

My name is William H. Brown. I am a Co-Chairman of the Lawyers' Committee for Civil Rights Under Law. Dean Erwin N. Griswold and I are here today on behalf of the Lawyers' Committee. Ninety members of our Board of Trustees, and sixty-six Directors and Trustees of local Lawyers' Committees affiliated with us have submitted a Statement urging the members of this Committee to oppose Judge Clarence Thomas' appointment as an Associate Justice of the Supreme Court of the United States. We have also submitted the concurring statement of one Board member, and three dissenting statements signed by a total of eight Board members. We have submitted an updated list of signers of these statements to the Committee. In addition to our Statement, we have submitted to this Committee our Memorandum on the Nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court.

The Lawyers' Committee for Civil Rights Under Law is a

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bipartisan legal organization established in 1963, at the request of President John F. Kennedy, to enlist the assistance of the private bar in the enforcement of civil rights. The Board of Trustees of the Lawyers' Committee is a bipartisan group of prominent American lawyers who are committed to strengthening civil rights protections where necessary and opposing measures which would unjustifiably diminish or curtail equal protection under the law. We are a diverse group, which includes liberals and conservatives, Republicans and Democrats, whites and minorities, men and women. We are bound together by our commitment to civil rights.

As a diverse group, 90 of us are united in our opposition to Judge Thomas. Although we are firm in our opposition, we did not come to this conclusion lightly. We entered into this debate with open minds, and, in fact, looked favorably upon the President's selection of a minority nominee because we believe it imperative that there be a breadth of perspectives among the members of the Supreme Court. As with any nominee, however, Judge Thomas' qualifications must be evaluated by reviewing his writings and speeches, his conduct as a public official and his testimony before this Committee.

Our Statement and our Memorandum show the care and the fairness of our review of his opinions, legal writings and speeches, of the actions which he took and the statements which he made during his tenure in the federal government. Based on these documents and on our evaluation of the testimony which he

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gave during these hearings, we have concluded that Judge Thomas' appointment to the Supreme Court would be a serious threat to the civil rights of all Americans.

The evidence against Judge Thomas is compelling. We believe that there are three reasons why this nomination should be rejected.

First, Judge Thomas has rejected much of the decisional framework on which our nation's protection of civil rights is based. He has argued for a limitation of the disparate-impact principle enacted by Congress in 1964, recognized by Chief Justice Burger for a unanimous Court in Griggs v. Duke Power Co.,<sup>1</sup> and re-affirmed by Congress in enacting the Equal Employment Opportunity Act of 1972.<sup>2</sup> He has disagreed with the legal theories and evidentiary bases necessary to challenge systemic discrimination,<sup>3</sup> and has opposed the temporary race- and gender-conscious remedies the courts have often held to be necessary in providing effective relief for systemic discrimination.<sup>4</sup> Such relief is particularly necessary in the frequent situation in

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<sup>1</sup> 401 U.S. 424 (1971).

<sup>2</sup> Pub.L. 92-261, 86 Stat. 103. The significance of the Griggs decision, Judge Thomas' initial support for it, and his abrupt change of view on it after the 1984 election, are discussed in detail in the Lawyers' Committee's Memorandum at 34-47.

<sup>3</sup> Judge Thomas' views on the use of statistical evidence in proving discrimination are discussed in detail in the Lawyers' Committee's Memorandum at 47-51.

<sup>4</sup> Judge Thomas' former and present views on affirmative action, and his rationale in support of his views, are discussed in detail in the Lawyers' Committee's Memorandum at 51-76.

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which it is impossible to provide purely individual remedies because the nature of the employer's discrimination has made it impossible to identify which particular black, Hispanic, Asian or woman would have been selected in the absence of discrimination. Its rejection would leave the courts without effective power to provide relief for the most serious instances of discrimination, and would leave employers powerless to undo the harm caused by their own past actions and those of others.

Second, Judge Thomas' theory of constitutional interpretation, which disregards the application of the Equal Protection Clause of the Fourteenth Amendment and rejects the concept of group violations, would make it impossible effectively to end systemic discrimination. For example, he has criticized the unanimous decision in Green v. County School Board of New Kent County,<sup>5</sup> and subsequent Supreme Court school desegregation decisions enforcing Brown v. Board of Education that compelled the dismantling of state-created segregated school systems.<sup>6</sup> He has thus disavowed a reading of the Constitution that would deny the Supreme Court, and the Congress, the authority to dismantle state-created segregated institutions. In the absence of a restructuring of long-segregated school systems and a view of the Constitution that insists that only individual liberties are

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<sup>5</sup> 391 U.S. 430 (1968).

<sup>6</sup> Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years 393 (D. Boaz, editor) [hereinafter Civil Rights as a Principle].

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protected, the black school children in Green would still have only an individual choice between a segregated white school and a black school. Judge Thomas' theory of constitutional interpretation will be discussed by Dean Griswold.

Third, in evaluating any judicial nomination, we must consider whether the nominee's overall legal philosophy, if adopted generally by the courts, provides meaningful protection for the civil rights of minorities and women. We accept that a nominee may differ with us on particular issues. We attach great weight, however, to adherence to the principle of legally enforceable equality of opportunity, and to the degree of thought and understanding the nominee brings to the resolution of these issues. Regrettably, we have not found the depth of analysis we must expect -- and the nation should require -- of any nominee for the Supreme Court, especially one who proposes the rejection of the hard-won legal foundation for established protections for equality.

In this regard, it is not enough that the nominee has repudiated before this Committee so much of the thought and conclusions to which he laid claim prior to his nomination. Even accepting the sincerity of his repudiation, the withdrawal of his life's work of analysis and reflection leaves a void no one can fill. This Committee now has no body of work on which to base its judgment of the nominee's own judgment. In the absence of such a body of work, there is no sufficient basis upon which this Committee can make the determination which should be made before

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recommending the confirmation of any nominee: that the quality, depth and breadth of the nominee's analysis would serve the Court and the country well in resolving the most important questions likely to come before the Court over the next generation.

Our concerns in each of these three areas, taken alone, would likely be enough to convince us that Judge Thomas should not sit on the Supreme Court. Taken together, these concerns present very strong evidence that Judge Thomas should not be confirmed.

II. Judge Thomas' Disagreements with the Legal Theories and Evidentiary Bases Necessary to Challenge Systemic Discrimination

A nominee's awareness that there are still substantial problems of entrenched discrimination against blacks, Hispanics, other minorities, and women is likely to affect his or her understanding of the cases which come to the attention of the Court. Between 1983 and 1987, Judge Thomas' view of the breadth of discrimination seems to have narrowed substantially. In 1983, Judge Thomas recognized that discrimination was more than an isolated phenomenon, and that it could not be eradicated solely through individual remedies.<sup>7</sup> In a speech to personnel officials, he

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<sup>7</sup> Judge Thomas' views of the breadth of discrimination are discussed in detail in the Lawyers' Committee's Memorandum at 22-30.

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stated:<sup>8</sup>

Our experience in administering fair employment laws for over the past 18 years has provided greater knowledge and understanding of the complex and pervasive manner in which employment discrimination continues to operate. Experience has taught us all that apparently neutral employment systems can still produce highly discriminatory effects. They can also perpetuate the effects of past discrimination.

In a 1987 law review article describing his disagreement with race- and gender-conscious relief, Judge Thomas argued that reliance on such relief was a natural outgrowth of an emphasis on broad challenges to employment discrimination, and stated that the EEOC was de-emphasizing such broad challenges.<sup>9</sup> In describing the EEOC's docket, he stated:<sup>10</sup>

In addition, most of our cases involve discrimination by a particular manager or supervisor, rather than a "policy" of discrimination. Many discriminating employers first responded to Title VII by turning from explicit policies against hiring minorities and women to unstated ones. Now even such veiled policies are uncommon; discrimination is left to individual bigots in positions of authority. As a result, the discrimination that we find today more often has a narrow impact, perhaps influencing only a few hiring decisions, and does not warrant the use of a goal that will affect a great number of subsequent hires or promotions.

We do not know of any change in the actions of employ-

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<sup>8</sup> March 17, 1983 Speech by Clarence Thomas to the American Society of Personnel Administrators, p. 4 (emphasis in original) [hereinafter, "March 17, 1983 Speech to A.S.P.A."].

<sup>9</sup> Clarence Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!, 5 Yale Law & Policy Review 402, 403-04 (1987) (footnote omitted) (emphasis in original) [hereinafter, "Affirmative Action Goals"].

<sup>10</sup> Id. at 405.

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ers during the four years from 1983 to 1987 which would justify the conclusion that broad patterns of discrimination had diminished in importance, or that women and minorities faced a different kind of threat at the end of this period than they had faced at its beginning. As the 1990 and 1991 Urban Institute reports<sup>11</sup> show, there are still broad patterns of disparate treatment affecting numerous persons at numerous employers.

Indeed, Judge Thomas may have come to his present emphasis on individual instances of discrimination even if he were convinced of the continuing nature of broad-scale, entrenched discrimination. In his profile in The Atlantic Monthly, he seemed to agree with the author's conclusions:<sup>12</sup>

If an employer over the years denies jobs to hundreds of qualified women or blacks because he does not want women or blacks working for him, Thomas is not prepared to see a "pattern and practice" of discrimination. He sees hundreds of local, individual acts of discrimination. Thomas would require every woman or black whom that employer had discriminated against to come to the government and prove his or her allegation. The burden is on the individual. The remedy is back pay and a job. "Anyone asking the government to do more is barking up the wrong tree," Thomas says.

This is a philosophy incapable of redressing patterns of discrimination. Placing repetitive burdens on victim after victim ensures that some will falter, ensures that the EEOC's resources

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<sup>11</sup> The Urban Institute's recent studies on disparate treatment involving matched pairs of black and white job applicants, and matched pairs of Hispanic and Anglo job applicants, are described in the Lawyers' Committee's Memorandum at 23-24.

<sup>12</sup> Juan Williams, A Question of Fairness, The Atlantic Monthly, February 1987, at pp. 71, 79.

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would be wasted in litigating the same question over and over against the same defendant, and ensures that much of the employer's discrimination will go unremedied.

In the pivotal Supreme Court decision of Griggs v. Duke Power Co., the Supreme Court recognized the disparate-impact theory of discrimination which Congress had enacted in 1964 and upheld the EEOC Guidelines on Employee Selection Procedures.<sup>13</sup> The treatise on employment discrimination law most widely used by practitioners describes Griggs as "the most important court decision in employment discrimination law."<sup>14</sup> Judge Thomas agrees that Griggs is one of the most important cases decided in the last twenty years.<sup>15</sup> As a result of Griggs, the EEOC Guidelines and the successor Uniform Guidelines, many employment practices were discarded because they had excluded minorities and women without good reason from jobs they could perform well. Any substantial weakening of Griggs carries with it the risk that employers will re-adopt needlessly exclusionary practices which will stratify the workforce along racial, ethnic, and gender lines.

As Chairman of the EEOC, Judge Thomas had a responsi-

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<sup>13</sup> The background and context of Griggs, the decision itself, and the EEOC Guidelines and Uniform Guidelines are discussed in detail in the Lawyers' Committee's Memorandum at 34-38.

<sup>14</sup> Barbara Lindemann Schlei and Paul Grossman, Employment Discrimination Law (Washington, D.C., Bureau of National Affairs, 2nd ed., 1983) at 5 (footnote omitted).

<sup>15</sup> Testimony of Judge Clarence Thomas in response to questioning by Senator Patrick Leahy, morning of September 13, 1991.

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bility to deal carefully and accurately with an issue so important. As late as 1983, Judge Thomas issued public statements which provided strong support for both the Supreme Court's decision in Griggs and the Uniform Guidelines.<sup>16</sup> In commenting upon the value of the Uniform Guidelines, Judge Thomas noted that they were developed as a result of "an exceedingly lengthy process" and that any "future decision to reassess these important provisions will be made with an eye to that kind of deliberate procedure".<sup>17</sup> He referred to the need for stability:<sup>18</sup>

The policies advanced by the EEOC Guidelines on Employee Selection Procedures ... have been given the force of law; they have given rise to a measure of certainty, stability in the employment arena; setting legal standards upon which both employers and employees can rely.

He cautioned against any weakening of the Guidelines:<sup>19</sup>

We are not dealing with common zoning ordinances here. Whole classes of people in this country have come to rely on the vital protection offered by measures such as these.

Despite his earlier position, Judge Thomas' publicly stated view of Griggs and the Uniform Guidelines changed abruptly after President Reagan's landslide 1984 election, without any public explanation for the shift or its timing. A few days after the re-election, he stated that he had "a lot of concern" about

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<sup>16</sup> March 17, 1983 Speech to American Society of Personnel Administrators, at 4. The text of the quotation is set forth in our Memorandum at 40-41.

<sup>17</sup> Id. at 11.

<sup>18</sup> Id. at 9.

<sup>19</sup> Id. at 11.

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the Uniform Guidelines, and that there was a good possibility that there will be "significant changes".<sup>20</sup> Three weeks later, he began to question the validity of Griggs and the disparate impact doctrine.<sup>21</sup> Complaining that Griggs had been "overextended and over-applied", he seemed to suggest that Griggs be limited to unskilled laboring positions.<sup>22</sup> In February of 1985 he criticized Griggs and the Uniform Guidelines in the strongest possible terms, and went on to suggest that the use of statistical proof in disparate impact cases was unsound:<sup>23</sup>

UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race-and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination."

The critical point is that, although Griggs and even

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<sup>20</sup> Policy Changes, Aggressive Enforcement, Will Mark Next Term at EEOC, Thomas Says, BNA Daily Labor Reporter, November 15, 1984, pp. A-6, A-8.

<sup>21</sup> Robert Pear, Changes Weighed in Federal Rules on Discrimination, N.Y. Times, December 3, 1984, at A1. See our Memorandum at 41-43.

<sup>22</sup> See our Memorandum at 43-45.

<sup>23</sup> February 1985 Report to the Office of Management and Budget, reprinted in Regulatory Program of the United States Government (August 8, 1985) (Statement of Clarence Thomas), at 523-24, also reprinted in Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess., at 127-28 (October 2, 1985).

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Wards Cove agree that an exclusionary practice should not simply be assumed to be proper and that evidence to show its propriety is necessary, Judge Thomas has criticized this requirement as assuming "some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people". His reference to even this remaining common ground between Griggs and the later decision in Wards Cove as outside "the plain meaning of the term 'discrimination'" necessarily raises the question whether he continues to accept this basic premise of Griggs, or whether he would go even farther than Wards Cove and abolish the disparate-impact standard altogether.

Such a change would restrict Title VII to cases of intentional discrimination, and leave minorities and women at the mercy of employers who would then have little incentive to curb their use of exclusionary practices. Indeed, employers which intended to limit their employment of blacks, Hispanics, or women could adopt paper-and-pencil tests, strength tests, and similar requirements secure in the knowledge that it would be extremely difficult to prove their wrongful intent in adopting such requirements but the results would be the same as with the more readily provable direct forms of intentional discrimination.

Disparate-impact cases, and broad patterns of discrimi-

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nation, require statistical evidence.<sup>24</sup> The Supreme Court has repeatedly held that proper statistical evidence taking job qualifications, availability and employer explanations into account can in appropriate cases be sufficient to prove discrimination.<sup>25</sup> Few employers admit that they are discriminating, and the nature of their actions has to be deduced from all of the employment decisions they have made. In Teamsters, the Court quoted with approval an appellate decision stating that "In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."<sup>26</sup>

We cannot and do not quarrel with the propositions that statistical evidence must be both accurate and appropriate, that unchallenged qualifications must be taken into account, that the defendant must always have an opportunity to provide explanations for any statistical disparities and that these must be considered, and that statistical evidence therefore creates at most a rebuttable presumption of discrimination. We also believe that there were legitimate grounds for the Chairman or anyone else to

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<sup>24</sup> Judge Thomas' views on the use of statistical evidence in discrimination cases are discussed in detail in the Lawyers' Committee's Memorandum at 47-51.

<sup>25</sup> E.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-41 (1977); Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977).

<sup>26</sup> 431 U.S. at 339 note 20 (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), cert. den., 404 U.S. 984 (1971)).

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criticize the EEOC's approach to statistical proof in some of its cases. However, our concern is that Judge Thomas' general criticisms of statistical proof in connection with his statements on the Griggs rule and his attacks on the Uniform Guidelines seemed to disregard the value of statistical proof altogether.

In an important document describing his plans for regulatory changes at the EEOC, he told the Office of Management and Budget that the plaintiff's threshold burden of proving disparate impact under Griggs and the Guidelines was "a mechanical statistical rule that has no relationship to the plain meaning of the term 'discrimination.'" Later in the same document, he stated that "statistical disparities ... may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination."<sup>27</sup>

These statements are extremely troubling. They may reflect an unwillingness to credit statistical proof even where the defendant has no credible rebuttal to the statistical evidence and the plaintiff has gone as far as possible in showing that a substantial disparity exists even after taking into account racial, national origin or gender differences in availability, in the possession of legitimate qualifications, and in other relevant factors. Such an approach would have the result of providing immunity for the many instances of discrimination

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<sup>27</sup> The quotation is set out in text above.

## LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

where no direct proof of discriminatory purpose is available, and where discrimination can only be inferred from the results of the employer's actions and the absence of any credible explanation.

Judge Thomas' criticisms of Griggs, the Guidelines and the proper use of statistical proof represent a radical, unexplained departure from his earlier endorsement of these tools for proving and remedying discrimination.

### III. Judge Thomas' Positions on Affirmative Action

Judge Thomas has consistently voiced reservations as to the use of race- and gender-conscious remedies for discrimination.<sup>28</sup> Despite his personal beliefs, during Judge Thomas' first two years at the EEOC, he usually was an advocate for existing EEOC policies including affirmative action, and specifically including the use of goals and timetables as flexible devices for monitoring an employer's conduct.<sup>29</sup> This stance often put him at odds with others in the Reagan Administration -- most frequently, William Bradford Reynolds, Assistant Attorney General For Civil Rights.

After President Reagan's re-election, Judge Thomas began to advocate publicly dramatic changes in EEOC policy.<sup>30</sup>

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<sup>28</sup> Judge Thomas' views are discussed in detail in the Lawyers' Committee's Memorandum at 52-76.

<sup>29</sup> These statements are discussed in detail in the Lawyers' Committee's Memorandum at 54-61.

<sup>30</sup> These statements are discussed in detail in the Lawyers' Committee's Memorandum at 61-66.

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In an interview immediately after election day, Judge Thomas announced that, henceforth, the Administration would speak with one voice and that there would be concerted efforts to make EEOC policy consistent with the Administration's philosophy.<sup>31</sup> Although Judge Thomas pledged a concerted effort after the election, he often thereafter took positions worse than the litigation positions of Mr. Reynolds' Civil Rights Division. Reynolds routinely relied on disparate-impact theory and thought it proper, while Judge Thomas was attacking the theory; Reynolds routinely relied on the Uniform Guidelines while Judge Thomas battled to have them revised. In late 1987, Mr. Reynolds joined Judge Thomas in his opposition to the Guidelines.

In 1986 and 1987, the Supreme Court decided a string of cases which together demonstrated conclusively that race- and gender-conscious policies were in many circumstances acceptable remedies for discrimination and acceptable responses to patterns of underrepresentation of women and minorities.<sup>32</sup> Judge Thomas expressed his personal disagreement with each of these decisions.<sup>33</sup> He has repeated his disagreement with these decisions

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<sup>31</sup> November 15, 1984 Policy Changes, *supra* note 20, at A-1.

<sup>32</sup> Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); and Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

<sup>33</sup> Affirmative Action Goals, *supra* note 9, at 403 note 3.

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before this Committee.<sup>34</sup>

The bottom line with respect to Judge Thomas' alternatives for affirmative action is that they are not alternatives. They reach proven cases of intentional discrimination against identified victims, but much of what is considered to be discrimination today in this country under existing law cannot be proved under that standard or does not constitute that type of discrimination, including most disparate-impact employment situations.

Judge Thomas answers that such discrimination is, at least, far less significant than it used to be. We believe he is incorrect; there is current evidence which establishes that such discrimination remains pervasive,<sup>35</sup> and numerous decisions in the 1980's and afterwards reflect its many occurrences.

If Judge Thomas is right --- if, for example, there are few significant discriminatory practices resulting in victims who cannot be identified --- then there will be little further need for affirmative action. When that happens, if it ever does, Judge Thomas' concerns about affirmative action will be substantially relieved.

There is much legitimate concern, and Judge Thomas expresses such concern, over what are appropriate affirmative action remedies in a particular case of proven discrimination, or

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<sup>34</sup> Testimony of Judge Clarence Thomas in response to questioning by Senator Edward Kennedy, morning of September 12, 1991; Testimony of Judge Clarence Thomas in response to questioning by Senator Arlen Specter, morning of September 13, 1991.

<sup>35</sup> See the Urban Institute studies discussed above at 23-24.

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in the settlement of discrimination claims, or in legislation providing for minority set-asides.<sup>36</sup> The tailoring of equitable relief in this area must truly be equitable, and that is an enormously difficult task. Judge Thomas' answer is to do away with the remedy entirely, and that strikes at the heart of established civil rights jurisprudence long recognized by the Congress, successive Administrations, and the courts.

Judge Thomas' many public statements do not adequately address the difficulty of providing any meaningful remedy for patterns of discrimination if affirmative action is not allowed, and if it is not possible to determine which particular black, Hispanic, Asian or female candidates would have been selected in the absence of discrimination. The problem is a very real one, and it arises frequently. If there is no meaningful remedy, even an intentional discriminator would have succeeded in its primary goal: keeping its workforce lily-white, or Anglo, or male, or as much so as possible. Such an employer does not limit itself to keeping a particular black, Hispanic, Asian or woman out; it wants to keep as many as possible out. A remedy which does not deprive the employer of such a goal is ineffective.

It is not an adequate answer to reject the promotion of potential victims because the precise victims are unknowable. If such rejections were to become the law, minorities and women would be left without the hope of a meaningful change in their

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<sup>36</sup> Drew S. Days III, Fullilove, 96 Yale Law Journal 453 (1987).

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workplace and would have correspondingly little incentive to file charges and litigate cases.

There is a substantial question whether Judge Thomas would vote to overturn the affirmative-action decisions the Court handed down from Heber to Johnson and Paradise, and thus to leave minorities and women without any effective remedy for past discrimination in those cases where individual victims cannot be precisely identified.

#### IV. Judge Thomas' Theories of Constitutional Interpretation

After reviewing Judge Thomas' legal writings and listening to his testimony before this Committee, we have concluded that Judge Thomas' disagreement with important Supreme Court decisions in the area of civil rights is merely an outgrowth of his unusual, and potentially disastrous, theory of constitutional interpretation, which disregards the Equal Protection Clause and rejects the concept that persons are protected from violations of their rights based on their membership in a group disfavored by society or a legislature. Judge Thomas' views stand in stark contrast to long-established constitutional analysis and threaten the guarantees of the Equal Protection Clause.

The Equal Protection Clause, applied to the States in the Fourteenth Amendment and applied to the Federal government in the Fifth Amendment, prohibits the classification of persons for discriminatory treatment on either an impermissible basis (such

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as race, gender or natural origin), or in the exercise of fundamental rights (such as the right to vote, to marry, to travel, and to seek access to the courts). The Equal Protection Clause stands as a guarantee that the exercise of fundamental rights are as available to the poor as to the wealthy, to whites as well as blacks, and to both men and women.

Despite the overwhelming importance of the Equal Protection Clause in our current system of constitutional jurisprudence, Judge Thomas has repeatedly rejected use of the Equal Protection Clause. Through statements concerning the proper application of constitutional principles,<sup>37</sup> his criticism of the analysis in Brown v. Board of Education,<sup>38</sup> and his interpretation of Judge Harlan's dissent in Plessy v. Ferguson,<sup>39</sup> Judge Thomas has made it plain that he opposes established equal protection doctrine on the asserted ground that it protects the rights of groups of persons, rather than individuals.

Thus, Judge Thomas has written that it is "error" to apply "the principle of freedom and dignity" to groups "rather

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<sup>37</sup> See e.g. Clarence Thomas, The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment, 12 Harvard Journal of Law and Public Policy 63 (1989); Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years 392 (D. Boaz, editor, 1988); Clarence Thomas, Toward a "Plain Reading" of the Constitution --- the Declaration of Independence in Constitutional Interpretation, 30 Howard Law Journal 691 (1987).

<sup>38</sup> 347 U.S. 483 (1954).

<sup>39</sup> 163 U.S. 537 (1896).

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than to individuals;<sup>40</sup> he has criticized the school desegregation cases following Green v. County School Board, claiming that they were "disastrous" and "more concerned with meeting the demands of groups than with protecting the rights of individuals;"<sup>41</sup> and he has criticized Justice Powell's opinion in Bakke v. Board of Regents for an alleged misplaced concern with "the admission of groups of whites" rather than with "rights inherent in the individual."<sup>42</sup>

It is apparent that Judge Thomas' rejection of the Equal Protection Clause arises from his conviction that the Constitution protects only the rights of individuals and that only an individual deprivation can be remedied. The result of this view of the Constitution is a refusal to recognize that discriminatory classifications affect not just one or several individuals, but all persons who find themselves members of a disfavored group. Under such a theory, judicial relief or congressional enactments designed to remove state-imposed barriers that affect all persons within a legislative classification or disfavored group in society is not supported by the Constitution.

Not only is Judge Thomas' view completely contrary to well-established law, but, if adopted by the Court, would seri-

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<sup>40</sup> Civil Rights as a Principle at 393.

<sup>41</sup> Id.

<sup>42</sup> Plain Reading at 700 and 700 note 36.

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ously undermine constitutional protections. The clearest example of this result is found in Judge Thomas' apparent criticism of the Green decision as departing from a "color-blind" view of the Constitution<sup>43</sup>. In Green, the Court rejected the school board's arguments that it could continue to operate separate "white" and "negro" schools simply by adopting a policy that ostensibly permitted individual black students to choose to attend "white" schools, and held that school authorities had to do more than purportedly offer individual students a choice, and were instead required "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>44</sup> To the extent that Green and subsequent school desegregation decisions imposed an obligation upon school authorities to dismantle the segregated "dual" school systems, they required "race-conscious remedies." A view of the Constitution that forbade a restructuring of long-segregated school systems, would have left individual black school children alone to confront a segregated school system. In the Supreme Court's insistence that black school children be afforded more than a theoretical choice, Judge Thomas evidently finds it to have been "more concerned with meeting the demands of groups than with protecting the rights of individuals."<sup>45</sup> The Supreme

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<sup>43</sup> Plain Reading, at 700.

<sup>44</sup> 391 U.S. at 437-38.

<sup>45</sup> Civil Rights as a Principle, at 393.

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Court's requirement that the continuing reality and structure of segregated school systems be dismantled -- in enrollment, faculty, condition of facilities and other respects -- Judge Thomas appears to perceive as "disastrous," reflecting a "lack of principle," and "against what was best in the American political tradition."<sup>46</sup>

Judge Thomas has not restricted his criticism of the application of equal protection principles to Brown and other school desegregation cases. For example, Judge Thomas has argued that deprivations of the right to vote should be found only with respect to individuals: "Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has sufficient clout."<sup>47</sup> He has, therefore, criticized equal protection precedent generally: "In both the areas of school desegregation and voting, the Court has tended to think in terms of protecting groups."<sup>48</sup>

An insistence that only the liberties of individuals are protected -- a deprecation of the protection of persons from different treatment through group-based governmental classifications -- and a view of the Constitution that forbids consider-

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<sup>46</sup> Id. (emphasis in original).

<sup>47</sup> "The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?," April 18, 1988 Speech by Clarence Thomas delivered at The Tocqueville Forum, Wake Forest University, at 17.

<sup>48</sup> Id.

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ation of race, for example, even where necessary to remedy a constitutional violation, would render the law incapable of removing barriers to equality for members of a disfavored group.

In the course of these hearings, Judge Thomas has indicated that he has no reason to "question or disagree with the three tier approach" which the Supreme Court currently uses in analyzing cases which fall under the Equal Protection Clause.<sup>49</sup> Moreover, he has gone so far as to indicate that in some instances involving particularly egregious cases of discrimination it might be appropriate to be "ratcheting up or applying a more exacting standard" than the current heightened scrutiny.<sup>50</sup> However, his unprecedented endorsement of equal protection analysis remains at odds with his long-standing rejection of the concept of protecting and remedying deprivations of rights that effect all persons falling within a classification. Moreover, the mere fact that Judge Thomas now states that he does not "disagree with the three tier approach" does not shed any light

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<sup>49</sup> Clarence Thomas Supreme Court Nomination, Hearings of the Senate Judiciary Committee, Testimony of Judge Thomas in response to questioning by Senator Dennis DeConcini, morning of September 11, 1991. See also Clarence Thomas Supreme Court Nomination, Hearings of the Senate Judiciary Committee, Testimony of Judge Thomas in response to questioning by Senator Edward Kennedy, morning of September 12, 1991; Clarence Thomas Supreme Court Nomination, Hearings of the Senate Judiciary Committee, Testimony of Judge Thomas in response to questioning by Senator Howell Heflin, afternoon of September 13, 1991.

<sup>50</sup> Clarence Thomas Supreme Court Nomination, Hearings of the Senate Judiciary Committee, Testimony of Judge Thomas in response to questioning by Senator Dennis DeConcini, morning of September 11, 1991.

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upon the manner in which he would apply such scrutiny to claimed violations. Unless Judge Thomas has completely abandoned his theory of constitutional interpretation, a transformation for which we have no evidence, and now accepts the notion that the constitution provides protection for all members of a group, as well as for individual violations, his acceptance of the Court's current approach to equal protection analysis is meaningless.

Even in light of Judge Thomas' acceptance of the Court's three tiered approach to equal protection analysis, we believe that his preference for individual remedies, as exemplified by his testimony criticizing the result which the Court reached in both Green and subsequent school desegregation decisions, indicate a continuing emphasis on individual remedies for violations of individual rights and a hostility to effective protections for all members of a disfavored classification. Barriers or discriminatory acts which effect whole groups of individuals cannot be effectively addressed by remedies which only effect a single individual. In light of widespread, institutional discrimination which we believe still exists in our society, Judge Thomas' emphasis on individual rights and remedies, and the inevitable consequences of these views, seriously threaten our ability to end systemic discrimination.

#### V. Conclusion

Prior to Judge Thomas' testimony before this Committee,

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a substantial majority of the members of the Board of Trustees of the Lawyers' Committee opposed Judge Thomas' nomination as Associate Justice of the Supreme Court. After listening to his testimony, we remain firm in our conviction that Judge Thomas' legal philosophy, with its disregard for established precedent, its hostility to the equal protection doctrine, and its reliance on individual rights, poses a substantial threat to the ability of minorities and women to enforce their civil rights.

Judge Thomas has criticized most of the judicial and statutory building blocks for the protection of civil rights in this country --- not only admittedly controversial and difficult court decisions and governmental policies, but also those widely accepted as fundamental to the protection of civil rights for every American. Judge Thomas has also attacked the Court and the Congress for their role in laying down those building blocks, arguing instead for a "limited government" that would leave Americans with rights but uncertain remedies --- or no remedies at all --- for violations of those rights.

Moreover, we believe that Judge Thomas' changes of position with respect to matters of fundamental importance do not demonstrate the reflection before reaching important conclusions which is essential in a Justice of the Supreme Court.

We urge the Senate not to confirm this nomination.

NOTES FOR APPEARANCE OF ERWIN N. GRISWOLD  
BEFORE THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE  
-- TUESDAY, SEPTEMBER 17, 1991

In the time available to me, I can only summarize. I will first say, though, that the present hearings seem to me to leave open several basic and important issues.

I. Qualifications

No one questions that Judge Thomas is a fine man, and deserves much credit for his achievements over the past forty-three years. But that does not support the conclusion that he has as yet demonstrated the distinction -- the depth of experience, the broad legal ability -- which the American people have the right to expect from persons chosen for our highest judicial tribunal. Compare his experience and demonstrated abilities with Charles Evans Hughes or Harlan Fiske Stone, with Robert H. Jackson or the second John M. Harlan, with Thurgood Marshall and Lewis H. Powell, for example. To say that Judge Thomas has such qualifications is obviously unwarranted. If he should continue to serve on the court of appeals for eight or ten

years, he may show such qualities, but he clearly has not done so yet.

I have no doubt that there are a number of persons, male or female, African American or white or Hispanic, who have demonstrated such distinction. I do not question that the President has the right to take ideological factors into consideration, and it seems equally clear to me that this Committee and the Senate have a similar right and power. But that is no reason for this Committee, or the Senate, approving a presidential nominee who has not yet demonstrated any clear intellectual or professional distinction. And the down side is frightening. The nominee, if confirmed, may well serve for forty years. That is until the year 2030. There does not seem to me to be any justification for taking such an awesome risk.

## II. Natural Law

Judge Thomas' present lack of depth seems to me to be demonstrated by his contact with the concept of "natural law." He has made various references to "natural law" in his speeches

and writing, though it is quite impossible to find in these any consistent understanding of that concept. This is very disturbing to me because loose use of the idea of natural law can serve as support for almost any desired conclusion, thus making it fairly easy to brush aside any enacted law on the authority of a higher law -- what Holmes called a "brooding omnipresence in the sky."

That is bad enough, but the nominee has now said to this Committee that he does not think that "natural law" plays any role in constitutional decisions. This is frightening indeed -- for it is quite clear in the two hundred years of this country under the Constitution that "natural law" or "higher law" concepts do have an appropriate role -- not in superseding the Constitution but in construing it.

Corwin, "The Higher Law Background of American Constitutional Law," 42 Harv. L. Rev. 149 (1928), 365 (1929)

Fuller, "The Morality of Law" (1964)

Rawl, "A Theory of Justice" (1971)

Bickel, "The Morality of Consent" (1975)

The Dred Scott case, for example, was one where the Court did not make adequate use of "natural justice." If it had done so, recognizing that Scott had become a citizen when he was taken to free territory, it might have averted the Civil War.

A more current example is Privacy. It is not mentioned in the Constitution, but the Supreme Court has rightly found it there by interpreting several of the Constitution's clauses together, in the light of deep-seated "natural justice" concepts, including the Court's conclusion and understanding that this is implicit in the basic concept of the founding fathers when they drafted the Constitution.

Cruel and Unusual Punishment

Weems v. United States, 217 U.S. 349 (1910)

Robinson v. California, 370 U.S. 660 (1962) -- The crime of being "addicted to the use of narcotics."

*Solem v. Helm*, 463 U.S. 277 (1983)

Rights of Conscience

*Welsh v. United States*, 398 U.S. 333 (1970) -- not a religion case. The petitioner asserted his beliefs were not religious.

III. Due Process

Voting

*Reynolds v. Sims*, 377 U.S. 533 (1964) - one man, one vote case

Denial of education to children of illegal aliens

*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

*Moore v. City of East Cleveland*, 431 U.S. 494 (1977), quoting Harlan, J.: Respect for the teachings of history [and] solid recognition of the basic values that underlie our society.

Appointment of Counsel

*Gideon V. Wainwright*, 372 U.S. 355 (1963)

Affirmative Action

For more than two hundred years, the white settlers in this new country grievously victimized persons of African descent, whose descendants today are our African American citizens. Not only were they held in slavery, but they were denied education and all cultural advantages.

It took a Civil War to end this massively unjust regime. But then we had the period of share croppers, and lynching, and Jim Crow. Though the slaves were free, their opportunities were severely restricted by force of law. It was not until the middle of this century that we began to move ahead, and, under the leadership of Lyndon B. Johnson, the Congress enacted a number of constructive statutes designed to provide greater equality of opportunity.

We should not forget that the Thirteenth, Fourteenth and Fifteenth Amendments were adopted as a result of the Civil War. They were essentially focused on African Americans. They were designed to pull the African Americans up to a position of

equality. Every one was protected by the Due Process Clause, but the African Americans needed it most. The same was true of the Equal Protection Clause. As Justice Blackmun has so well said in this opinion in the Bakke case (Regents of the University of California v. Bakke, 437 U.S. 265, 407 (1978):

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetrate racial supremacy.

Frankfurter, J., in *Railway Mail Association v. Corsi*, 326 U.S. 88, 97 (1945)

A State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that amendment.

Any one who has lived through the past fifty years can see that we have made some progress. When I was a young man in the Department of Justice, now sixty years ago, it would have been

inconceivable that the President would nominate a black man to the Supreme Court, or that the Senate would give serious consideration in such a case. There were then no black lawyers in the Department of Justice, no black F.B.I. Agents.

We have made progress, but not enough. I hate to think that the progress we have made will come to a halt by a literalistic interpretation of the Civil War Amendments, thus frustrating the accomplishment of what they were clearly intended to do.

#### IV. Other Questions

What is the nominee's approach to other important questions which frequently come before the Court?

Separation of Powers

Preemption -- When does a federal statute over-ride state law?

Intergovernmental immunities

ON THE NOMINATION OF JUDGE CLARENCE THOMAS  
AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President John F. Kennedy to enlist the private bar in the enforcement of civil rights. This statement is submitted on behalf of the members of the Board of Trustees of the Lawyers' Committee whose names are attached. We have concluded that Judge Clarence Thomas should not be confirmed as an Associate Justice of the Supreme Court of the United States.

Since its founding, the Lawyers' Committee and its members have been concerned with making the rule of law as effective for the protection of civil rights as it has been for the protection of other established rights. We have sought to enforce the existing law through litigation on behalf of racial minorities and women. In addition, we have endeavored to strengthen civil rights protections where necessary, and we have opposed measures which would unjustifiably diminish or curtail equal protection under the law.

In evaluating any judicial nomination, we must consider whether the nominee's overall legal philosophy, if adopted generally by the courts, provides meaningful protection for the civil rights of minorities and women. We accept that a nominee may differ with us on particular issues. We attach great weight, however, to adherence to the principle of legally enforceable equality of opportunity, and to the degree of thought and understanding the nominee brings to the resolution of these issues.

Only when a nominee's stated legal philosophy clearly threatens these principles, which are of enormous national impor-

tance, have the members of the Lawyers' Committee chosen to recommend the rejection of a nomination. In its 28-year history, the members have opposed only one other judicial nominee.

We have reviewed and considered the published articles and written statements of Judge Thomas from the foregoing perspective. Judge Thomas has announced his disagreement with many of the major judicial decisions that constitute the underpinnings of modern-day civil rights jurisprudence. He has proposed in their stead novel and ill-considered theories of constitutional and statutory interpretation that would substantially erode the fundamental civil rights protections of minorities and women. Regrettably, we have not found the depth of analysis we must expect -- and the nation should require -- of any nominee for the Supreme Court, especially one who proposes the rejection of the foundation for hard-won, established legal protections for equality.

\* \* \*

While conceding that discrimination still exists, Judge Thomas focuses on individual acts of discrimination and de-emphasizes the importance of systematic institutionalized bias. For example, he has written that in his experience "even such veiled policies are uncommon; discrimination is left to individual bigots in positions of authority", "perhaps influencing only a few hiring decisions". He has disagreed with the legal theories and evidentiary bases necessary to challenge systemic discrimination, and has opposed the broad remedies the courts have often held to be necessary in providing effective relief to the victims of such discrimination.

\* \* \*

Judge Thomas' legal philosophy evidences a hostility to, and rejection of, the core of civil rights jurisprudence in the areas of school desegregation, voting rights, employment discrimination, and affirmative action generally. Specifically, we emphasize the following:

- He has criticized Green v. School Board of New Kent County, the unanimous 1968 Supreme Court decision which invalidated "freedom-of-choice" plans that served to perpetuate officially segregated white and black schools, and imposed an obligation to eliminate racial discrimination from schools "root and branch." Judge Thomas wrote: "... in the Green ... case, we discovered that Brown not only ended segregation but required school integration. And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education." In the absence of Green, school authorities would have had no obligation to dismantle state-segregated schools.

- He has criticized the Supreme Court's decisions interpreting the Voting Rights Act on the ground that the Court has not limited its inquiry to whether an individual's right to vote is impaired. This view reflects a refusal to acknowledge that the Act was designed to remove electoral or districting schemes that dilute or render meaningless the ballots of minority voters. Judge Thomas' views would preserve electoral systems that effectively disenfranchise minority voters.

- He has criticized the Griggs v. Duke Power Co. decision, which construed Title VII as prohibiting employment practices having a discriminatory impact, unless they are shown to be job-related. He has questioned the validity of statistical evidence (an essential element of proof in disparate impact cases challenging practices that appear fair in form but discriminate in effect), and implied that the protections of Griggs should be limited to menial jobs.

- He has rejected on policy grounds, such leading precedents as United Steelworkers v. Weber, Johnson v. Transportation Agency, Santa Clara County, Local 29 of the Sheet Metal Workers v. FCC, and United States v. Paradise, permitting race- and gender-conscious remedies under limited circumstances. These are often the only effective remedies for broad patterns of discrimination.

- He has rejected the Supreme Court's decision in Fullilove v. Klutznick and has strongly criticized Congress for enacting the minority set-aside program it approved as a remedy for the long-standing exclusion of minority contractors from public works programs. Similarly, he has sharply criticized affirmative action programs that allow race to be considered along with other factors in the admission of minority students in higher education, such as the type of program approved in Bakke v. Regents of the University

of California.

Judge Thomas' views reflect a significant departure from the civil rights jurisprudence and policies that are embodied in Supreme Court decisions, federal and state laws, and the voluntary actions of private and public institutions throughout the country. Judge Thomas' views are even more disturbing because he advanced these positions when, as Chairman of the Equal Employment Opportunity Commission, he was under a sworn duty to enforce and uphold much of the law he was denouncing.

\* \* \*

In addition to disapproving bedrock civil rights precedents, Judge Thomas has fashioned a radical and incomplete theory of constitutional interpretation that undermines protections for many of the civil rights of American citizens. Specifically, Judge Thomas disregards an analysis of discrimination and inequality under the Equal Protection Clause of the Fourteenth Amendment, in favor of his own only partially articulated interpretation of the long-dormant Privileges and Immunities Clause, an interpretation that would result in the protection of only the liberties of individuals. This constitutional theory would endanger the power of Congress and the courts to remove state-imposed barriers to equality for disfavored groups. Quite apart from this nominee's substantive positions, his writings and statements suggest a cavalier disregard for the context and substance of Constitutional provisions, Congressional enactments, and Supreme Court holdings critical to the rights of minorities and women.

For example, in order to reach his theory of constitutional interpretation, Judge Thomas ignores or rejects not only the

text and history of the Fourteenth Amendment, but of the Constitution itself. Judge Thomas supports his theory of interpretation by the novel argument that the Declaration of Independence is incorporated into the Constitution through its "explicit" reference to the Declaration in Article VII, which states only:

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of Our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

Similarly, although advocating the incorporation into the Constitution of broad notions of "inalienable rights" -- drawn from the Declaration of Independence -- Judge Thomas rejects and ridicules use of the Ninth Amendment, which refers specifically to unenumerated rights "retained by the people." Thus, Judge Thomas displaces the text and established framework of constitutional jurisprudence in favor of undefined natural-law theories.

Finally, he has criticized the reasoning of Brown v. Board of Education -- a decision that continues to stand as the pillar upon which rests much of the jurisprudence of equal rights and opportunity for minorities and women -- and attributes what he views as subsequent Supreme Court errors to this allegedly faulty reasoning. Yet his criticism places great emphasis on a questionable interpretation of Justice Harlan's 1896 dissenting opinion in Plessy v. Ferguson, and neglects the extensive and scholarly contributions to the debate concerning the Brown decision. To suggest that Brown and other landmark civil rights decisions rest on insubstantial ground, without providing a persuasive argument or analysis to support the criticism, cannot be ignored when the critic stands as a nominee to the Supreme Court.

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Based upon a thorough analysis of Judge Thomas' published articles and written statements, it is clear that he disagrees with the legal theories and remedies necessary to remove the formidable barriers that still block the path of African-Americans and other minorities; that he is hostile towards leading Supreme Court civil rights precedent; and that his ill-defined expressions of constitutional and statutory interpretation would forsake established constitutional protections for untested theories lacking credible support in established legal and philosophical jurisprudence. Although reasonable people may differ with respect to whether any one of these points would disqualify Judge Thomas from being a Supreme Court Justice, we believe strongly that the combination of these three inadequacies is clearly disqualifying.

In light of the deficiencies in his legal analysis, his disregard for established precedent, and his stark opposition to the principles that the Lawyers' Committee for Civil Rights Under Law has advocated -- which must be vigorously defended at this critical juncture in our country's history -- we urge the United States Senate to reject the nomination of Judge Clarence Thomas as Associate Justice of the Supreme Court of the United States.

APPENDIX A

Howard J. Aibel	Eleanor M. Fox
Albert E. Arent	Edward M. Friend, Jr.
Clinton Bamberger	A. Spencer Gilbert, III
Thomas D. Barr	Linda S. Greene
G. d'Andelot Belin	Erwin N. Griswold
David R. Brink	Herbert J. Hansell
Brooksley Born	Seth M. Hufstедler
Jack E. Brown	Jerome E. Hyman
Tyrone Brown	Hugh R. Jones, Jr.
William H. Brown	John B. Jones, Jr.
Goler T. Butcher	Robert H. Kapp
Robert Carswell	Maximilian W. Kempner
J. LeVonne Chambers	Stuart J. Land
Irvin B. Charne	Robert M. Landis
Frank Cicero, Jr.	George N. Lindsay
James E. Coleman, Jr.	John V. Lindsay
Jerome A. Cooper	Hans F. Loeser
James T. Danaher	Robert MacCrate
Drew S. Days, III	Henry L. Marsh III
Armand G. Derfner	Joseph P. Martori
Sara-Ann Determan	Gabrielle McDonald
Adrian W. DeWind	Ronald S. Miller
John W. Douglas	Robert F. Mullen
Robert Ehrenbard	Robert A. Murphy
Cassandra Flipper	James M. Nabrit, III
Laurence S. Fordham	Frederick M. Nicholas
Alexander D. Forger	Eleanor Holmes Norton

APPENDIX A

Kenneth Penegar

Stephen J. Pollak

Norman Redlich

Judith Resnik

James Robertson

William D. Rogers

Edward W. Rosston

Edwin A. Rothschild

Charles Runyon

Lowell E. Sachnoff

David M. Satz, Jr.

Paul C. Saunders

John H. Schafer

Bernard G. Segal

Jerome G. Shapiro

Otis M. Smith

McNeill Smith

Asa D. Sokolow

Nicholas U. Sommerfield

David S. Tatel

John E. Tobin

Michael Traynor

Harold R. Tyler, Jr.

Cyrus R. Vance

James Vorenberg

Herbert M. Wachtell

Togo D. West, Jr.

Francis M. Wheat

Roger Wilkins

John Taylor Williams

Judith A. Winston

APPENDIX B - LAWYERS AFFILIATED WITH LOCAL LAWYERS' COMMITTEESBoston

Kathryn Abrams

John F. Adkins

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Bernard J. Bonn, III

Mark S. Brodin

Judith O. Brown

Steven S. Fischman

Nancy Gertner

Geraldine S. Hines

William P. Homans, Jr.

Laurence M. Johnson

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 Deborah K. Orlik  
 Lawrence B. Steinberg  
 Ronald T. Vera  
 William L. Winslow

Philadelphia

Gilbert P. Carrasco  
Richard H. de Lone  
William Epstein  
William H. Ewing  
Kenneth C. Frazier  
Nancy H. Fullam  
Richard C. Glazer  
Jeffrey W. Golan  
Phoebe Haddon  
Norman L. Holmes  
Lawrence T. Hoyle, Jr.  
Donald K. Joseph  
Suzanne S. Levy  
Marciene S. Mattleman  
Marcia L. Olives

Wendy C. Shiba  
Patrick F.E. Temple-West  
Joseph A. Torregrossa  
Robert T. Vance, Jr.  
Shelly D. Yanoff

San Francisco

William Alderman  
Morris J. Baller  
Alice Beasley  
Carolyn Patty Blum  
Wynne Carvill  
Terry Helbush  
Bill Ong Hing  
Gordon Lau

Raymond Charles Marshall

Drucilla Ramey

Bernida Reagan

Mark I. Schickman

Robert A. Thompson

Polly Webber

Washington, D.C.

Charles R. Both

Allen T. Eaton

Warren Kaplan

## Lawyers' Committee For Civil Rights Under Law

Concurring Opinion of  
Laurence S. Fordham, Esq.  
Boston, Massachusetts

As a member of the Board of Directors of the Lawyers' Committee, I wish to file a concurring opinion opposing the nomination of Judge Thomas as a Justice of the Supreme Court. I do so solely on the basis that his public record as it appears is not of the quality that should be nominated and confirmed as a Justice of the Supreme Court.

The Nation needs and deserves high quality on the Supreme Court. The Court is too important for less. The practice of ideological appointments do not serve the Nation well.

The position of the Committee of the American Bar Association that reviewed the nomination confirms this view as to quality. It is difficult to say that any competent lawyer or judge is not qualified. Many competent lawyers and judges are qualified.

The standard should be excellence or well qualified. Judge Thomas has not been so rated.

It does not appear that he has demonstrated the standard of excellence that should be requisite to nomination and confirmation to the United States Supreme Court.

If the President is not going to insist on excellence in appointments to the Supreme Court, then scrutiny of nominees as to whether they meet the standard of excellence should begin in the United States Senate.

Ideological differences aside, excellence should be the standard, or well qualified in the rhetoric of the Committee of the American Bar Association that reviews judicial appointments.

Labels - conservative and liberal - do not assist. Quality should be the core concern, such as demonstrated before nomination by Justices Holmes, Harlan and Powell, all of whom would be widely perceived by lawyers and other interested

citizens alike, as conservative and meeting the highest standards of excellence. The Nation imperatively needs excellent or well qualified nominees, whether they be labelled conservatives, moderates or liberals by those disposed to labels.

The most important label is excellence.

If the nomination is confirmed, I sincerely hope he demonstrates excellence as a Justice of the Supreme Court.

Respectfully submitted,

*Laurence S. Fordham*

Laurence S. Fordham  
Member, Board of Directors  
of the Lawyers Committee For  
Civil Rights Under Law  
Boston, Massachusetts

FSL1340

**Dissent to the Statement Presented by  
the Lawyers' Committee for Civil Rights Under Law  
on the Nomination of Judge Clarence Thomas as an  
Associate Justice of the United States Supreme Court**

I disagree with the decision to file in the name of the Lawyers' Committee a Statement in Opposition to the nomination of Judge Clarence Thomas to the United States Supreme Court. I have great respect for the judgment and intellectual integrity of the members who prepared the Statement in Opposition. I would feel more comfortable with their conclusion, however, if a more balanced view were presented. I am disappointed that every evaluation, observation or conjecture in the Statement is in the negative. It is admittedly more a brief in opposition than an objective evaluation. The Statement does not acknowledge the positive qualities which Judge Thomas would bring to our highest court. It does not give the Congress a fair picture of the nominee.

Judge Thomas would bring to the Court a background of experience seldom, if ever before, found on our highest tribunal. It cannot be questioned that he is and will remain throughout life a staunch foe of discrimination. It seems a gross overstatement to describe Judge Thomas' view of the place of the Declaration of Independence in constitutional interpretation as a "radical and incomplete theory." Judge Thomas' view, as I understand it, is that the guarantees of the Fourteenth Amendment are undergirded by the assertion in the Declaration of Independence "that all men are created equal." This is a concept of fundamental morality which should be reflected in all

of our laws and governmental actions. To suggest that such a noble principle can be twisted and misused is not a legitimate criticism of a person who expresses it in its purest form. Nor does it take anything away from the Civil War Amendments to recognize that the immorality of discrimination set forth so clearly in the words of the Declaration of Independence should have colored the interpretation of the Constitution in pre-war years, particularly on the issue of slavery.

One might differ with some of Judge Thomas' views as to the procedures by which equality may be achieved and discrimination eliminated in our land. But he is a young man, forty-three years of age, with less than twenty years of professional life as a lawyer, Federal appointee and Judge of a Federal Court of Appeals. It impresses me greatly that he is willing to speak and write so extensively about our Nation's social problems, the related laws and court decisions, the philosophy behind them and their effectiveness in achieving their declared objectives. His professional life has been a continuing learning experience and he has been remarkably honest and responsible to express his views and so invite constructive comment. I feel confident that Judge Thomas' judicial philosophy will continue to grow and develop during future years on the Court, just as has been true in the case of many other Justices before him.

Judge Thomas undertakes to dignify the status of the individual. Those in opposition to Judge Thomas would seemingly

give primary attention to broad actions for the benefit of groups with the expectation that individual benefits would follow. Of course, neither emphasis is intended to be exclusive of the other but the difference is meaningful in understanding Judge Thomas' strengths and the apparent basis for much of the opposition to him. He has asserted repeatedly that the greatest needs for the children of the very poor, especially among African-Americans and other minorities, are education, self-esteem, the work ethic, the influence of a stable family and the church. As I understand Judge Thomas, he considers these to be valuable ingredients in a young person's efforts to overcome the handicaps of racial discrimination. The difficulty of attainment of these ends should not direct attention away from their importance. Nor should Judge Thomas be criticized for expressing his belief that some of our social programs may not have been administered in a way that supports attainment of these objectives. We should not insist that our minority leaders think in "lock-step" and we should not reject those who attempt to be objective and innovative in their thinking. Judge Thomas has been an excellent role model for our young people of all races and economic levels. He should be applauded for this, not faulted on theoretical and hypothetical grounds.

Judge Thomas' critics make much of his primary emphasis on the individual rather than on the group in his years of service as Chairman of the Equal Employment Opportunity Commission. A former General Counsel of the EEOC under Judge

Thomas, Professor Charles A. Shanor of the Emory Law School, tells me that, even though the program of the Commission had reached a point where most large employers had introduced fair employment policies, systematic cases of discrimination were pursued vigorously. Additionally, many cases of individual mistreatment were arising, particularly in discriminatory discharges and these were actively pressed. Giving primary emphasis to the vigorous pursuit of meritorious complaints by individuals is the sort of policy decision a governmental official must often make, with which others may differ, but it hardly indicates a rigid and unacceptable judicial philosophy.

Over the past two academic years, Judge Thomas has visited the Emory Law School where he has been named a Distinguished Lecturer in Law. In that position, he talks with students, staff, and faculty, teaches several classes and shares his experiences as a federal judge with the Law School community. His travel expenses are paid, but there is no other financial consideration. On his last visit, he taught classes in Legal Ethics, Employment Discrimination and Constitutional Law. He met with the Black Law Students Association, the Federalist Society, the editorial boards of the School's three law reviews, and joined in a discussion group with faculty members and, at his request, the support staff. With the latter group, he spent about two hours patiently answering questions about what it means to be a judge. As expressed by Dean Howard O. Hunter, "It was apparent to me and to everyone else that he is a man who takes

his duties as a judge very seriously and who is aware that a judge must, to the extent possible, be aware of the compassion of the law as well as the rule of law."

The following appraisal of Judge Thomas provided by Dean Hunter is instructive:

He has not forgotten his roots. He understands the importance of family, friends and customs in the creation of a society. He recognizes that law is a matter of trust in a democracy, and that without the bonds of trust among members of a society the possibilities for self-government are slim. He has understanding and empathy for those who are less fortunate, but he is not condescending. He has a sharp intellect and can hold his own with the best of our faculty, but he can also carry on an easy and mutually enjoyable conversation with every member of our support staff. And perhaps most important, he has a wry, self-deprecating sense of humor. Judges who take themselves too seriously and are too sure of their own opinions concern me, but I have more confidence in those blessed with a healthy sense of their own limitations.

This appraisal was heartily endorsed by Larry D. Thompson, a highly respected Atlanta lawyer, a former United States Attorney and now a partner with the law firm of King and Spalding. Mr. Thompson served with Judge Thomas in the legal department of a national corporation and has for years been a close friend and confidant.

At the least, it would seem appropriate for the Lawyers' Committee to refrain from a recommendation until after the nominee has been given a hearing.

The strength of my feeling about Judge Thomas is not attributable to the fact that he is a fellow Georgian and Southerner. However, interest in the welfare of a native son compels me to express my views when otherwise I might be inclined to remain silent. I must confess that my sense of "fair play" is offended. I regret that the Statement in Opposition fails entirely to recognize what a bulwark against discrimination and a fighter for equality this young Judge from Pin Point, Georgia, can be expected to be for many years ahead.

For the foregoing reasons, I dissent from the Statement in Opposition.

Randolph W. Thrower  
999 Peachtree Street, N.E.  
Atlanta, GA 30309-3996

Joining in Mr. Thrower's Dissent:

Morris B. Abram,  
U.S. Ambassador to  
U.N. European Office  
Geneva, Switzerland

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41 Madison Avenue  
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Prof. Gray Thoron  
The Cornell Law School  
Myron Taylor Hall  
Ithaca, New York 14853-4901

Leonard Garment, Esq.  
Dickstein, Shapiro & Morin  
2101 L Street, N.W.  
Washington, D.C. 20037

Additional Dissenting Opinion:

I also disagree with the Statement in Opposition, in part for the reasons stated by Mr. Thrower, but primarily because of its timing. The nominee should be given his day in Court.

Victor M. Earle, III  
220 E. 42nd Street  
21st Floor  
New York, New York 10017

Concurring in Mr. Earle's dissent:

Jerome B. Libin  
1275 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Additional Dissenting Opinion:

I dissent from the Statement in Opposition for the reason that I believe the Committee should await the conclusion of a full hearing by the Senate Judiciary Committee before taking a position.

Stuart L. Kadison  
2049 Century Park East  
Los Angeles, CA 90067

Additional Dissent by Trustee of Lawyers' Committee

Joining in Mr. Thrower's dissent:

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The Cornell Law School  
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## LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Introduction

This Memorandum provides the background and context for the statement in opposition of Members of the Lawyers' Committee for Civil Rights Under Law On the Nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court. While many of the materials discussed herein were available to the members of the Lawyers' Committee who signed that statement, this Memorandum itself was not available because it was prepared subsequently. This Memorandum discusses the many public statements of Judge Thomas on the proper means of interpreting the Constitution and on the existing legal framework for the protection of civil rights.

This assessment is based upon Judge Thomas's academic writings, speeches, written interviews, and stated positions as Chairman of the Equal Employment Opportunity Commission. We have attempted to provide an accurate portrayal of Judge Thomas's views based on these materials. Where Judge Thomas has taken a position publicly, we assume that he continues to adhere to that position unless he has publicly revised such views. Where Judge Thomas has revised his views, we have attempted accurately to indicate the substance of the revision and the point in time at which it was made.

This memorandum does not discuss the decisions of Judge Thomas as a Judge of the United States Court of Appeals for the District of Columbia Circuit. Judge Thomas has testified that "as a lower court judge, I would be bound by the Supreme Court

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decision" governing a matter.<sup>1</sup>

A. Judge Thomas's Theory of Constitutional Interpretation

1. His Rejection of Existing Legal Protections Based on the Equal Protection Clause

Judge Thomas has written and spoken widely on his views of constitutional interpretation. Judge Thomas has directed his attention primarily to the constitutional bases on which racial segregation is, or should have been, held to be unconstitutional. He has indicated that his analysis of the Constitution and post-Civil War Amendments, though based on his interpretation of Justice Harlan's dissenting opinion in Plessy v. Ferguson,<sup>2</sup> provides "a foundation for interpreting not only cases involving race, but the entire Constitution and its scheme of protecting rights."<sup>3</sup> Judge Thomas's views stand in stark contrast to long-established constitutional analysis and Supreme Court precedent and, as such, threaten the foundations of the guarantees of the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause, applied to the States in the Fourteenth Amendment and applied to the Federal government in the Fifth Amendment, prohibit these governments from classifying

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<sup>1</sup> Confirmation Hearings on Federal Appointments Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess., p. 30, Part 4 (1990) (statement of Judge Clarence Thomas).

<sup>2</sup> 163 U.S. 537 (1896).

<sup>3</sup> Clarence Thomas, The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment, 12 Harvard Journal of Law and Public Policy 63, 68 (1989) [hereinafter, Higher Law].

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persons for discriminatory treatment on either an impermissible basis (such as race, gender, national origin, and illegitimacy),<sup>4</sup> or in the exercise of fundamental rights (such as the right to vote, to marry, to travel, and to seek access to the courts). "In recent years the equal protection guarantee has become the single most important concept in the Constitution for the protection of individual rights."<sup>5</sup> It was on equal protection grounds, for example, that poll taxes, property-ownership and other restrictions on the right to vote were invalidated, and inequitable voting districts were required to conform to the principle of "one person-one vote."<sup>6</sup> The Equal Protection Clause has also stood as a guarantee that the exercise of fundamental rights are as available to the poor as to the wealthy, not only with regard to voting, but when faced with criminal prosecution.<sup>7</sup>

Judge Thomas has consistently expressed an incomplete theory of constitutional interpretation, difficult to understand, that radically departs from this most basic protection of civil

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<sup>4</sup> Strauder v. West Virginia, 100 U.S. 303 (1880) (race); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (national origin); Brown v. Board of Education, 347 U.S. 483 (1954) (race); Reed v. Reed, 404 U.S. 71 (1971) (gender); Frontiero v. Richardson, 411 U.S. 677 (1973) (gender)(Fifth Amendment); Levy v. Louisiana, 391 U.S. 68 (1968) ("illegitimate" children); Graham v. Richardson, 403 U.S. 365 (1971) (aliens)

<sup>5</sup> J. Novak, R. Rotunda, & J. Young, Constitutional Law 585 (2d ed., 1983)

<sup>6</sup> Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

<sup>7</sup> Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963)

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rights afforded by the Constitution. Specifically, Judge Thomas disregards an analysis of discrimination and inequality under the Equal Protection Clause of the Fourteenth Amendment, in favor of a suggested analysis based upon the Privileges or Immunities Clause of that Amendment.

Judge Thomas's speeches and written statements do not specifically reject every use of the Equal Protection Clause. While not disagreeing with the result in Brown v. Board of Education,<sup>8</sup> Judge Thomas has criticized the basis on which the decision was rendered. Through statements concerning the proper application of constitutional principles, his criticism of Brown and subsequent cases based on equal protection grounds, and his interpretation of Justice Harlan's dissent in Plessy and its significance, Judge Thomas makes plain that he opposes established equal protection doctrine that he views as protecting the rights of groups of persons.

Thus, in criticizing the views of Professor Ronald Dworkin, Judge Thomas writes:<sup>9</sup>

... Dworkin does go to the core of the civil rights debate today. Dworkin correctly notes the primacy of the principle of freedom and dignity, but I think he misunderstands the substance of that principle. He reveals his error by applying his principle to groups, rather than to individuals. For it is above all the protection of individual rights that America, in its best moments, has in its heart and mind.

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<sup>8</sup> 347 U.S. 483 (1954).

<sup>9</sup> Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years 392 (D. Boaz, editor) [hereinafter Civil Rights as a Principle].

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In an "attempt to recover that foundation of individual liberties," Judge Thomas criticizes the "[Supreme] Court for 'voodoo jurisprudence'" and "the development of civil rights law since Brown".<sup>10</sup> The Brown decision, he contends, is without "adequate principle," and subsequent Supreme Court decisions that followed and applied Brown are "disastrous" and are "more concerned with meeting the demands of groups than with protecting the rights of individuals."<sup>11</sup>

Judge Thomas has developed much of his criticism of the Supreme Court's use of the Equal Protection Clause starting from his criticism of the reasoning of the unanimous opinion in Brown. Specifically, Judge Thomas attributes the "lack of principle" in Brown to its reliance on "[p]sychological evidence, compassion, and a failure to connect segregation with the evil of slavery".<sup>12</sup> Judge Thomas is not alone in his criticism regarding Brown, although his statements and writings do not discuss the substantial scholarly debate on this subject.<sup>13</sup> Instead, his criticism is based nearly exclusively on the reading he gives to Justice Harlan's Plessy dissent, discussed below.

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<sup>10</sup> Id.

<sup>11</sup> Id. at 393.

<sup>12</sup> Id.

<sup>13</sup> Judge Thomas's criticism of Brown makes reference only to two articles written by a political scientist at the Claremont Graduate School, and to Simple Justice, a book chronicling the history of the Brown case which does not analyze or critique the decision of the Court. Clarence Thomas, Toward a "Plain Reading" of the Constitution --- the Declaration of Independence in Constitutional Interpretation, 30 Howard Law Journal 691, 699 notes 32, 33 (1987) [hereinafter, Plain Reading].

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2. His Proposed Substitution of a Theory of Rights Based on the Privileges or Immunities Clause

Judge Thomas concludes that Brown should have been decided on an entirely different basis. "The great flaw of Brown is that it did not rely on Justice Harlan's dissent in Plessy, which understood well that the fundamental issue of guidance by the Founders' constitutional principles lay at the heart of the segregation issue,"<sup>14</sup> asserts Judge Thomas. In order to fully understand this reference, it is important to understand Judge Thomas's interpretation of Justice Harlan's dissent. Essentially, he views it as an expression of "higher law" jurisprudence, and as having been based on the Thirteenth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment.

Specifically, Judge Thomas states that: "Justice Harlan's opinion provides one of our best examples of natural rights or higher law jurisprudence."<sup>15</sup> This may not be readily apparent, asserts Judge Thomas, because "[i]n order to appreciate the subtleties of Justice Harlan's dissent, one must read it in light of the 'higher law' background of the Constitution."<sup>16</sup> Such natural law principles are expressed in the Declaration of Independence and Judge Thomas finds Justice Harlan to have implicitly written them into the Constitution through the Privileges or Immunities Clause and the guarantee clause of Article

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<sup>14</sup> Id. at 698.

<sup>15</sup> Higher Law, supra note 3, at 66-67.

<sup>16</sup> Plain Reading, supra note 13, at 701.

## LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

IV, Section 4 of the Constitution.<sup>17</sup> Thus, Judge Thomas concludes that "[t]he proper way to interpret the Civil War Amendments is as extensions of the promise of the original Constitution which in turn was intended to fulfill the promise of the Declaration."<sup>18</sup> Reference to "the old Natural law tradition of the founders -- which enshrines the natural rights of all men", Judge Thomas posits, "allows us to reassert the primacy of the individual".<sup>19</sup>

More particularly, Judge Thomas finds the dissent premised on three bases growing from the Founder's notions of "universal principles of equality and liberty."<sup>20</sup> First, he restates the dissent's view that the Thirteenth Amendment prohibited "badges of slavery" in addition to abolishing slavery and "decreed universal civil freedom".<sup>21</sup> Second, Judge Thomas asserts that Justice Harlan applied the intention of the Founders in viewing segregation as "an unreasonable infringement of personal freedom."<sup>22</sup> Third, Judge Thomas finds that the dissent articulated a view of the Constitution as "color-blind."<sup>23</sup>

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<sup>17</sup> Higher Law, *supra* note 3, at 67-68; Plain Reading, *supra* note 13, at 701.

<sup>18</sup> Plain Reading, *supra* note 13, at 702.

<sup>19</sup> April 25, 1988 Speech delivered at California State University. pp 10-11.

<sup>20</sup> Plain Reading, *supra* note 13, at 701

<sup>21</sup> *Id.*, quoting Plessy, 163 U.S. at 555 (Harlan, J. dissenting).

<sup>22</sup> *Id.* at 701.

<sup>23</sup> *Id.*

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Judge Thomas does not inform us of his view of the significance of Justice Harlan's reliance on the Thirteenth Amendment, other than that Brown was remiss in not finding the roots of segregation in slavery.<sup>24</sup> As to his emphasis on "personal freedom," Judge Thomas has made clear his perspective: "Thus has civil rights become entrenched as an interest-group issue rather than an issue of principle and universal significance for all individuals."<sup>25</sup> Finally, with regard to the "color blind" Constitution, Judge Thomas identifies "racial preference policies" as at odds with "color-blind principles," and criticizes Justice Powell's equal protection analysis in Bakke as more concerned with "the admission of groups of whites" than with "rights inherent in the individual."<sup>26</sup>

Having identified what he views as the bases on which Brown should have been decided, Judge Thomas does not explain the practical consequence of such a decision. Instead, we are informed that "[t]he first principles of equality and liberty should inspire our political and constitutional thinking" and "... could lead us above petty squabbling over 'quotas,' 'affirmative action,' and race-conscious remedies for social ills."<sup>27</sup>

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<sup>24</sup> Id. at 699.

<sup>25</sup> Civil Rights as a Principle, supra note 9, at 392.

<sup>26</sup> Plain Reading, supra note 13, at 700 and 700 note 36.

<sup>27</sup> Id. at 703.

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3. The Consequences of a Theory that the Constitution Does Not Require "Equal Protection of the Law", But Only Protects Individual Liberty Interests

In search of illustrations of the consequences of a Brown decision reaching the same result, but based on the principles suggested by Judge Thomas, we return to his criticism of the cases following Brown. "[I]n the Green ... case," he contends, "we discovered that Brown not only ended segregation but required school integration. And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education."<sup>28</sup> That Judge Thomas distinguishes the Green holding from that of the original Brown decision and views it as leading to a series of decisions he views as "disastrous" provides some insight into the change in course he perceives would, or should, have followed a Brown decision grounded in "an adequate principle."<sup>29</sup>

The decision in Green v. County School Board of New Kent County,<sup>30</sup> was the Supreme Court's response to fourteen years of massive resistance to the right of school children to be free from segregation announced in Brown. In a unanimous decision, the Court held that such rights were not guaranteed simply by pronouncements that individual black students were permitted to choose to attend "white" schools, where separate "white" and

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<sup>28</sup> Civil Rights as a Principle, *supra* note 9, at 393 (discussing Green v. County School Board of New Kent County, 391 U.S. 430 (1968))

<sup>29</sup> Civil Rights as a Principle, *supra* note 9, at 393.

<sup>30</sup> 391 U.S. 430 (1968)

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"negro" schools continued to be operated on a completely segregated basis. An officially segregated school district sought to preserve segregation by continuing to operate its separate one-race schools, but adopting a policy that individual students had a "freedom of choice" to attend a different school. No white students chose to attend black schools and few black students risked crossing the "color line" to enroll in all-white schools. Indeed, this "freedom of choice" was frequently impaired by intimidation, threats and violence.<sup>31</sup> In answer to the pleas of black parents, the Supreme Court held that school authorities had to do more than purportedly offer individual students a choice, and were instead required "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>32</sup>

Judge Thomas's criticism or characterization of the Green decision as "requir[ing] school integration"<sup>33</sup> mirrors the argument of the segregationist school board in that case: to require it to do more to end segregation than announce a "freedom of choice" policy amounted to a reading of the Fourteenth Amendment as requiring "compulsory integration."<sup>34</sup> This argument, and such a reading of the Fourteenth Amendment, was rejected by

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<sup>31</sup> United States Commission on Civil Rights, Southern School Desegregation, 1966-67 88 (1967), quoted in Green, 391 U.S. at 440-41.

<sup>32</sup> 391 U.S. at 437-38.

<sup>33</sup> Civil Rights as a Principle, supra note 9, at 393.

<sup>34</sup> 391 U.S. at 437.

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the Court, which found presented "the question whether the Board has achieved the 'racially nondiscriminatory school system' Brown II held must be effectuated," and refused to adopt a par se rule invalidating all "freedom of choice" plans.<sup>35</sup>

Similarly, to the extent Judge Thomas criticizes the decision as not viewing the interests of school children at issue as "personal freedom[s]," his argument is similar to that once advanced by the segregationists, who sought to avoid the command of Brown by arguing that the Constitution guaranteed only "personal rights" that could be asserted and enforced only by each individual. They were acutely aware that if the Constitution protects only the rights of individuals, then only an individual deprivation could be remedied, and segregated institutions could be preserved, subject only to the exceptional individual case.

This strategy is clearly described in correspondence between the Chief Counsel of the South Carolina School Segregation Committee (the "Gressette Committee"), David W. Robinson, and the Attorney General of South Carolina, T. C. Callison, dated June 5, and June 11, 1954, respectively -- one month after the first Brown decision.<sup>36</sup> In suggesting arguments to be presented by either the Clarendon County School District or the State of South Carolina in the argument leading to the second Brown decision, Mr. Robinson proposed the following:

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<sup>35</sup> 391 U.S. at 437, 439-40.

<sup>36</sup> Gressette Committee Files, South Carolina State Archives. Copies are available from the Lawyers' Committee.

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In a recent conversation with you I suggested that the problem of adjusting our public school situation to Chief Justice Warren's opinion might be soluble if the Supreme Court in its decree held to the view that the equal protection clause of the Fourteenth Amendment protected a personal right which could not be enforced or waived by any other person.

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It seems to me that if the Court would restrict its decree in line with the principle that the right to go to a mixed school is individual and personal, for which reason each child or each parent may exercise the right, or refuse to exercise it, the school authorities could adjust their operations within the frame work of the present segregated public school program.

Such a restrictive decree would in the first instance permit the Board of Trustees to assign white and negro students to segregated schools. The Legislature might then provide an administrative procedure whereby any parent dissatisfied with the assignment of his child to the nearest segregated school could petition the County board to permit his child to go to the nearest school of the other race. This right to petition should be restricted in various ways. A suggested procedure might require the petition to be filed sixty days before the opening of the September term; might authorize the Board of Trustees to take sworn testimony; require the presence of the parents; restrict the legal representation by the parent to members of the South Carolina Bar resident in the State; might provide an appeal to the County Board, then to the State Board, then to the Court of Common Pleas.

Since it is my view that most of the parents prefer their children to go to segregated schools, there would be few taking advantage of this procedure. If a negro parent persisted in urging his constitutional right, it is my thought that a few negro children in the white schools would not create a serious problem.

Judge Thomas's apparent criticism of the Green decision as departing from a "color-blind" view of the Constitution<sup>37</sup> is troubling. To the extent that Green and subsequent school

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<sup>37</sup> Plain Reading, *supra* note 13, at 700

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desegregation decisions imposed an obligation upon school authorities to dismantle the segregated "dual" school systems, they required "race-conscious remedies." In the absence of a restructuring of long-segregated school systems, the black school children in Green would still have only a choice between a white school and a black school. In the Supreme Court's insistence that black school children be afforded more than a theoretical choice, Judge Thomas evidently finds it to have been "more concerned with meeting the demands of groups than with protecting the rights of individuals."<sup>38</sup> The Supreme Court's requirement that the continuing reality and structure of segregated school systems be dismantled -- in enrollment, faculty, condition of facilities and other respects -- Judge Thomas appears to perceive as "disastrous," reflecting a "lack of principle," and "against what was best in the American political tradition."<sup>39</sup>

Judge Thomas has not restricted his criticism of the application of equal protection principles to Brown and other school desegregation cases. For example, Judge Thomas has argued that deprivations of the right to vote should be found only with respect to individuals: "Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has

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<sup>38</sup> Civil Rights as a Principle, *supra* note 9, at 393

<sup>39</sup> Id. (emphasis in original)

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sufficient clout."<sup>40</sup> He has, therefore, criticized equal protection precedent generally: "In both the areas of school desegregation and voting, the Court has tended to think in terms of protecting groups. This tendency is most sharply noted in cases dealing with what is known as affirmative action, but is better denominated racial (or gender) preference schemes."<sup>41</sup>

An insistence that only the liberties of individuals are protected -- a deprecation of the protection of persons from different treatment through group-based governmental classifications -- and a view of the Constitution that forbids consideration of race, for example, even where necessary to remedy a constitutional violation, would render the law incapable of removing barriers to equality for members of a disfavored group.

4. His Theory that the Declaration of Independence and Its References to the "Laws of Nature and of Nature's God" Are Expressly Incorporated into the Constitution

As discussed in the preceding section, Judge Thomas has fashioned an interpretation of the Constitution based primarily on his own reading of Justice Harlan's dissent in Plessy v. Ferguson. Apart from the substance of that interpretation, Judge Thomas's method and sources of analysis, in this and other instances, deserve comment.

An important premise of Judge Thomas's interpretation

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<sup>40</sup> "The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?" April 18, 1988 Speech by Clarence Thomas delivered at The Tocqueville Forum, Wake Forest University, at 17 [hereinafter "April 18, 1988 Tocqueville Forum Speech"]

<sup>41</sup> Id.

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of the Harlan dissent in Plessy is his conclusion that the opinion, insofar as it relied on the Fourteenth Amendment, was based on the Privileges or Immunities Clause, rather than the Equal Protection Clause. Thus, Judge Thomas begins his analysis with the statement that: "It is not sufficiently appreciated that Justice Harlan's dissent focused on both the Thirteenth and the entire Fourteenth Amendments -- in particular, the 'privileges or immunities of citizens of the United States' clause."<sup>42</sup> However, he subsequently departs from this view of the dissent's treatment of the Fourteenth Amendment and concludes that the dissent relied exclusively on the Privileges or Immunities Clause. Judge Thomas reaches this conclusion based on the following interpretation of the language employed by Justice Harlan in the opinion:<sup>43</sup>

He brings us back to privileges and immunities by constantly speaking of "citizens" and their rights. . . . That Justice Harlan spoke of "citizens" rather than "persons" shows that he relied on the Privileges and Immunities Clause rather than on either the Equal Protection or the Due Process Clause, both of which refer to persons.

Justice Harlan, however, quoted the Privileges or Immunities, Equal Protection and Due Process Clauses of the Fourteenth Amendment together, along with the separate clause granting citizenship to persons born or naturalized in the United States, and made frequent use of the word "citizen."<sup>44</sup> He did

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<sup>42</sup> Higher Law, supra note 3, at 66

<sup>43</sup> Id. at 67 (footnote omitted).

<sup>44</sup> 163 U.S. at 553-62 (Harlan, J., dissenting).

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not single out the Privileges or Immunities Clause, and used language fully consistent with analysis under the Equal Protection Clause:<sup>45</sup>

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Another basic premise of Judge Thomas's interpretation of the Plessy dissent is his determination that: "Justice Harlan's opinion provides one of our best examples of natural rights or higher law jurisprudence."<sup>46</sup> Although Justice Harlan did not speak of "natural law," "higher law," or the Declaration of Independence, Judge Thomas finds Justice Harlan to have implicitly written into the Constitution the natural law principles of the Declaration of Independence. As support for this proposition Judge Thomas refers us to "the briefs which Homer Plessy submitted" to the Court, and the following quote from the briefs:<sup>47</sup>

The Declaration of Independence ... is not a fable as some of our modern theorists would have us believe, but the all-embracing formula of personal rights on which our government is based .... [This] controlling genius of the American people ... must always be taken into account in construing any expression of the sovereign will ... .

Indeed, Judge Thomas repeatedly asserts that the Constitution cannot be comprehended without reference to higher law.

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<sup>45</sup> 163 U.S. at 559; See also at 555.

<sup>46</sup> Higher Law, supra note 3, at 66-67.

<sup>47</sup> Id. at 67-68 (citation omitted).

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The rule of law in America means nothing outside constitutional government and constitutionalism, and these are simply unintelligible without a higher law. Men cannot rule others by their consent unless their common humanity is understood in light of transcendent standards provided by the Declaration's "Laws of Nature and of Nature's God." Natural Law provides a basis in human dignity by which we can judge whether human beings are just or unjust, noble or ignoble.<sup>48</sup>

Although the concept of natural law is not referred to in the text of the Constitution, Judge Thomas argues that the Declaration of Independence, which includes a reference to "Laws of Nature and of Nature's God" is explicitly incorporated into the Constitution.<sup>49</sup> According to Judge Thomas,<sup>50</sup>

... the Constitution makes explicit reference to the Declaration of Independence in Article VII, stating that the Constitution is presented to the states for ratification by the Convention "the Seventeenth Day of September in the Year of our Lord one-thousand seven-hundred and eighty-seven (and) of the Independence of the United States of America the Twelfth ... ."

Based upon this short phrase in the Constitution, he asserts that the Constitution should be understood "in light of the Declaration of Independence" and that the Framers intended to incorporate the Declaration into the Constitution.<sup>51</sup>

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<sup>48</sup> Remarks of Clarence Thomas in panel discussion, "Affirmative Action: Cure or Contradiction?", *Center Magazine*, November/December 1987, at 21. See also March 5, 1988 Speech by Clarence Thomas to the Federalist Society for Law and Policy Studies, University of Virginia School of Law, at 5.

<sup>49</sup> Judge Thomas has frequently articulated the view that "important parts of the Constitution are inexplicable" if the Declaration of Independence is not incorporated into the Constitution. See, e.g., Higher Law, supra note 3 at 64-67, Plain Reading, supra note 13 at 691, 693-95.

<sup>50</sup> Plain Reading, supra note 13, at 695.

<sup>51</sup> Higher Law, supra note 3, at 64-65.

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5. His Insistence that the Ninth Amendment to the Constitution is Only an Historical Reminder of the Limited Powers of the Federal Government, and His Rejection of Any Judicial Enforcement of the Amendment Because It Refers to Rights Which Are Not Specified

Although Judge Thomas has posed an interpretation of the Constitution in such a way as to incorporate the natural law concepts of the Declaration of Independence, he has expressed a disdain for the concept of unenumerated rights "reserved to the people" in the Ninth Amendment, despite its explicit inclusion in the text of the document. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people." The Supreme Court has repeatedly found that the Ninth Amendment protects the right to privacy and personal liberty. For example, relying upon the privacy protections embodied in the Ninth Amendment, in Griswold v. Connecticut,<sup>32</sup> the Supreme Court struck down a Connecticut law that banned distribution of medical information and advice about contraceptives to a married couple; seven years later, in Eisenstadt v. Baird,<sup>33</sup> the Supreme Court held that, under the Ninth Amendment, laws which banned the distribution of contraceptives to unmarried individuals were also unconstitutional.

Judge Thomas does not view the Ninth Amendment as a source of unenumerated rights, as in these decisions, but states

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<sup>32</sup> 381 U.S. 479 (1965)

<sup>33</sup> 405 U.S. 438 (1972)

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that "it has a great significance in that it reminds us that the Constitution is a document of limited government."<sup>54</sup> Thus, he has expressed "misgivings about activist judicial use of the Ninth Amendment,"<sup>55</sup> and has argued against a reading of the Amendment that protects unenumerated rights. He has suggested that an interpretation of the Ninth Amendment which gives the Supreme Court power to strike down legislation

... would seem to be a blank check. The Court could designate something to be a right and then strike down any law it thought violated that right.<sup>56</sup>

Although Judge Thomas rejects the use of the Ninth Amendment to define and protect unenumerated rights as a "blank check," he advocates the reinvigoration of the "Privileges or Immunities Clause" of the Fourteenth Amendment as a vehicle through which undefined natural or higher law principles are incorporated into the Constitution.<sup>57</sup> Indeed, Judge Thomas frankly admits that such an approach attempts to "giv[e] body to open-ended constitutional provisions,"<sup>58</sup> and that "[t]he specific content of these privileges and immunities is to be determined by both the courts and Congress."<sup>59</sup> Judge Thomas would thus apparently abandon established Ninth Amendment precedent and the

<sup>54</sup> Civil Rights as a Principle, *supra* note 9, at 398

<sup>55</sup> Higher Law, *supra* note 3, at 63 note 2

<sup>56</sup> Civil Rights as a Principle, *supra* note 9, at 399

<sup>57</sup> See text *supra* at 6-7 and 14-17

<sup>58</sup> Higher Law, *supra* note 3, at 63.

<sup>59</sup> Id. at 67.

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Framers' explicit reservation of unenumerated rights, in favor of the blank slate of a Privileges or Immunities Clause interpreted to incorporate the undefined higher law principles noted in the Declaration of Independence.

B. Judge Thomas's Positions on School Desegregation and on Enforcement of the 1982 Amendments to the Voting Rights Act

As noted in the discussion of Judge Thomas' theories of constitutional interpretation above, he has rejected the reasoning of the decision in Brown v. Board of Education as without "adequate principle."<sup>60</sup> He has also criticized the Supreme Court's holding in Green v. County School Board, mischaracterizing it as requiring integration. Although not identifying them with any specificity, he has expressed an apparent blanket rejection of more than 20 years of established Supreme Court school desegregation precedent following Green:<sup>61</sup>

And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education. The Court appeared in these and many other cases to be more concerned with meeting the demands of groups than with protecting the rights of individuals. I could go into other cases, but the principle, or rather the lack of principle, is clear enough. In a good cause, the Court was attempting to argue against what was best in the American political tradition.

Judge Thomas's criticisms of Green and of the Supreme Court decisions following Green are not limited to his opposition

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<sup>60</sup> Civil Rights as a Principle, supra note 9, at 393

<sup>61</sup> Id. (emphasis added)

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to "busing" as a remedy. The criticized cases include the Court's unanimous decisions rejecting persistent delays and attempts to avoid compliance with Brown even after Green,<sup>62</sup> requiring that faculties be desegregated,<sup>63</sup> announcing that only upon school authorities' default in the obligation to remove official segregation could courts order desegregation plans,<sup>64</sup> and authorizing compensatory and remedial education programs for students harmed by segregation.<sup>65</sup> In addition, these decisions applied Brown to "Northern" school districts, required discriminatory "intent" as a prerequisite to the duty to desegregate,<sup>66</sup> and limited the scope of metropolitan remedies.<sup>67</sup>

The grave consequences of Judge Thomas' theories of constitutional interpretation with respect to the Equal Protection Clause and school desegregation have been discussed above. However, if Judge Thomas' views had prevailed, hundreds of thousands of school children now in desegregated schools would still be attending schools established along racial lines.

Judge Thomas has also criticized the Court's Voting Rights Act cases for "presuppos[ing] that blacks, whites, Hispan-

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<sup>62</sup> Saa, s.g., Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969)

<sup>63</sup> United States v. Montgomery County Bd. of Ed., 395 U.S. 225 (1969)

<sup>64</sup> Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971)

<sup>65</sup> Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977)

<sup>66</sup> Kees v. School District No. 1, 413 U.S. 189 (1973).

<sup>67</sup> Milliken v. Bradley (Milliken I), 418 U.S. 717 (1974).

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ics, and other ethnic groups will inevitably vote in blocs."<sup>68</sup> Although he did not specify the objectionable decision by name, it is clear he was referring to Thornbury v. Gingles,<sup>69</sup> a decision interpreting the 1982 amendments to Section 2 of the Voting Rights Act, which prohibits election laws and practices with a racially discriminatory effect, including those that would dilute the voting strength of minorities. In Gingles the Court did not "assume" that people vote in racial blocs. Instead, the Court said that Section 2 requires the plaintiff to bear the burden of proving that racial bloc voting does occur in the jurisdiction; only then can a challenge be raised to election laws and redistricting plans that would scatter minority voters so that they have no opportunity to elect a candidate of their choice.<sup>70</sup>

C. Judge Thomas's Views on the Present Breadth of Employment Discrimination

A nominee's awareness that there are still substantial problems of entrenched discrimination against blacks, Hispanics, other minorities, and women is likely to affect his or her understanding of the cases which come to the attention of the Court. For example, if a nominee believes that the remaining problems of discrimination essentially involve isolated instances of individual discrimination, he or she is unlikely to understand the

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<sup>68</sup> April 18, 1988 Tocqueville Forum Speech, supra note 40, at 17

<sup>69</sup> 478 U.S. 30 (1986).

<sup>70</sup> 478 U.S. at 55-58.

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importance of the kinds of procedural and evidentiary rules required to allow effective challenges to systemic discrimination. The question whether a nominee believes that systemic discrimination still exists is therefore highly relevant to his or her suitability to sit on the Court.

We recognize, as does everyone, that an enormous amount of progress in reducing discrimination has been made since the time of the decision in Brown v. Board of Education and since passage of the Civil Rights Act of 1964. At the same time, we must recognize that a great deal more remains to be done.

The Urban Institute's recent studies on disparate treatment involving matched pairs of black and white job applicants, and matched pairs of Hispanic and Anglo job applicants, graphically illustrate the extent of the remaining problem. Each member of a pair had the same "age, physical size, education, experience, and other 'human capital' characteristics," as well as the same "openness, apparent energy level, and articulateness". They had conventional appearance, conventional dress, and used conventional language. They applied for low-skilled entry-level jobs requiring limited experience, in response to newspaper advertisements.<sup>71</sup> The testing for disparate racial treatment between equally qualified blacks and whites took place in Chicago and in Washington, D.C. The results showed substantial differences: in 20% of the pairs, whites advanced farther than equally-

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<sup>71</sup> Margery Austin Turner, Michael Fix, and Raymond J. Struyk, Opportunities Denied, Opportunities Diminished: Discrimination in Hiring (Washington, D.C., Urban Institute Press, 1991) at 4, 9, 12

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qualified blacks, compared to 7% of the pairs in which blacks advanced farther than equally-qualified whites. In 15% of the pairs, only whites received job offers, compared to 5% of the pairs in which only blacks received job offers.<sup>72</sup> The testing for disparate national-origin treatment involved Hispanic citizens and Anglo citizens in Chicago and in San Diego. Hispanics were three times more likely than equally-qualified Anglos to encounter unfavorable treatment. Anglos received 33% more interviews, and 52% more job offers, than equally-qualified Hispanics.<sup>73</sup> The same results could probably be replicated in every city in the country.

Between 1983 and 1987, his view of the breadth of discrimination seems to have narrowed substantially. In 1983, Judge Thomas recognized that discrimination was more than an isolated phenomenon, and that it could not be eradicated solely through individual remedies. In a speech to personnel officials, he stated:<sup>74</sup>

Our experience in administering fair employment laws for over the past 18 years has provided greater knowledge and understanding of the complex and pervasive manner in which employment discrimination continues to operate. Experience has taught us all that apparently neutral employment systems can still produce highly

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<sup>72</sup> Id. at 18-19

<sup>73</sup> Harry Cross, Genevieve Kenney, Jane Mell, and Wendy Zimmerman, Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers, Urban Institute Report 90-4 at pp. 1-3 and 20-23 (Washington, D.C., Urban Institute Press, 1990).

<sup>74</sup> March 17, 1983 Speech by Clarence Thomas to the American Society of Personnel Administrators, p. 4 (emphasis in original) [hereinafter, "March 17, 1983 Speech to A.S.P.A."].

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discriminatory effects. They can also perpetuate the effects of past discrimination.

In a 1983 speech to a women's organization, he stated:<sup>75</sup>

Although, my commitment to individual rights causes me to raise questions about the effectiveness of group remedies, with the exception of quotas, I support many affirmative action remedies. I support these remedies because the remedies which are truly necessary to make individual rights a meaningful reality are not yet on the books.

In a 1983 speech to the Kansas City Bar Association, Judge Thomas stated: "I have even supported the use of some so-called affirmative action remedies . . . despite the social problems which can result from an over-reliance on them . . . ."<sup>76</sup> At that time, Judge Thomas often stressed the pervasiveness of discrimination notwithstanding its changing nature, while recognizing that other problems must also be addressed:<sup>77</sup>

In many respects, the problem of discrimination also has changed. Yesterday, we confronted clear-cut acts of blatant discrimination. Today, we are facing less obvious, but no less pervasive effects caused by discrimination. Moreover, the problem of discrimination is compounded by a lack of preparation.

The EEOC's enforcement priorities mirrored the narrowing of his views over this period. In a 1987 law review article

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<sup>75</sup> March 30, 1983 Speech by Clarence Thomas to the General Meeting of Women Employed in Chicago, Ill., pp 14-15 (hereinafter, "March 30, 1983 Speech to Women Employed");

<sup>76</sup> April 28, 1983 Speech by Clarence Thomas to the Kansas City Bar Association, pp 22-23 (hereinafter, "April 28, 1983 Kansas City Bar Speech")

<sup>77</sup> September 19, 1983 Speech by Clarence Thomas before the Capital Press Club at the Capital Press Club in Washington, D C . p. 15 See also August 2, 1983 Speech by Clarence Thomas before the National Urban League, p. 7, July 8, 1983 Speech by Clarence Thomas before the Commonwealth Club of California, p. 6.

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describing his disagreement with race- and gender-conscious relief, Judge Thomas argued that reliance on such relief was a natural outgrowth of an emphasis on broad challenges to employment discrimination:<sup>78</sup>

... During the mid- and late-1970s, the Commission concentrated its efforts to enforce Title VII on suits that would affect large numbers of people. The EEOC first obtained authority to litigate employment discrimination suits under a 1972 amendment to the Civil Rights Act of 1964. At that time, blatant discrimination was still prevalent. Many employers openly maintained "No Blacks/Women Need Apply" policies, and many others had moved such practices underground. Minorities and women were not advancing into the workforce in as great numbers as many had hoped.

The Commission, confronted with the enormity of the problem and limitations on its litigation resources, took a "bang for the buck" approach to fighting discrimination. Although Title VII guaranteed individuals the right to be free of discrimination in employment, the Commission did not attempt to right every wrong individually, a task for which its litigation machinery was not prepared. Instead, the Commission tried to make quick statistical progress by funneling resources into challenges against the hiring practices of some of the country's largest employers. During this period, suits were brought against such companies as American Telephone and Telegraph, General Electric, Ford Motor, General Motors, and Sears Roebuck.

The use of remedies that included racially defined goals and timetables was a necessary consequence of the emphasis on this kind of litigation. Under then-prevailing judicial standards, many of these cases were based solely on statistical disparities. Frequently, all that was known was that members of one group were substantially underrepresented in the employer's workforce....

Arguing that it was often impossible to provide back pay relief because of the difficulty in determining "which of the

<sup>78</sup> Clarence Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!, 5 Yale Law & Policy Review 402, 403-04 (1987) (footnote omitted) (emphasis in original) [hereinafter, "Affirmative Action Goals"].

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many rejected applicants would have been hired absent discrimination," Judge Thomas stated that the result was a resort to relief "under which other members of the victims' class were given positions as substitutes for those who would have been employed had nondiscriminatory selection criteria been used." The result of the Commission's concentration on big cases was, he argued, that individuals who did not raise class-type issues or other priority issues were overlooked. The Commission was unlikely "to go to bat" for them in court.<sup>79</sup>

In point of fact, the courts have developed means for providing back pay relief in situations in which it is impossible to identify the individuals who would have been selected in the absence of discrimination.<sup>80</sup> In Congressional hearings held on April 15, 1983, Judge Thomas recognized the propriety of using formulas in order to provide effective back pay relief where the nature of the employer's discrimination made it impossible to identify which of the discriminatees would have been selected in the absence of discrimination:<sup>81</sup>

... [I]n cases where it is impossible or diffi-

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<sup>79</sup> Id. at 404

<sup>80</sup> E.g., Carlett v. Missouri Highway and Transp. Comm'n., 828 F 2d 1260 1267 (8th Cir. 1987), Segar v. Smith, 738 F 2d 1249 1289-91 (D.C. Cir. 1984) cert. den., 471 U.S. 1115 (1985), White v. Carolina Paperboard Corp., 564 F 2d 1073, 1087 (4th Cir. 1977), Pettrway v. American Cast Iron Pipe Co., 494 F 2d 211, 260-63 (5th Cir. 1974) (the courts can award back pay in a manner avoiding the "quagmire of hypothetical judgment")

<sup>81</sup> Testimony of Clarence Thomas, Oversight Hearings on the OFCCP's Proposed Affirmative Action Regulations Before the Subcommittee on Employment Opportunities of the House Committee on Labor, 97th Cong., 1st Sess., at 66 (1983) [hereinafter, "1983 Oversight Hearings on the OFCCP"].

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cult to determine the precise relief that should go to the individuals, remedies have permitted the use of formula relief. Whether or not the specific case that you outline would be one of those cases, I do not know. But it is available in cases where it would be impractical to provide such individual relief.

In his Yale article, Judge Thomas then turned to the present breadth of discrimination and of the EEOC's litigation challenging discrimination:<sup>62</sup>

The Commission has now entered a new stage in its enforcement work. Although systemic litigation is still an area of emphasis for the Commission, it no longer need consume our resources to the exclusion of other types of cases. Many of the very large employers who once appeared to discriminate have been brought into compliance through lawsuits and Commissioner Charges. Other large and sophisticated employers, in response to the publicity surrounding the Commission's efforts, voluntarily changed their discriminatory practices and sought to remedy the continuing effects of those practices. Now, for the first time, the Commission has the luxury and freedom to fight to vindicate the Title VII rights of every individual victim of discrimination. The Commission has committed itself to a policy of seeking full relief for every victim of discrimination who files a charge. ...

It is now more likely that the Commission will be able to identify the discriminatees entitled to back pay or placement after making a finding of discrimination in hiring or promotion. Our emphasis on helping all individuals who come to the Commission's offices with claims of discrimination means that in most cases we will know who the victims are. Even many of our larger class action cases are set in motion by complaints filed by individuals rather than by the observation of a statistical disparity. Needless to say, the Commission's ability to produce flesh-and-blood victims is very helpful when we go to court to prove discrimination.

In addition, most of our cases involve discrimination by a particular manager or supervisor, rather than a "policy" of discrimination. Many discriminating employers first responded to Title VII by turning from

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<sup>62</sup> Affirmative Action Goals, *supra* note 78, at 404-05 (footnote omitted).

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explicit policies against hiring minorities and women to unstated ones. Now even such veiled policies are uncommon; discrimination is left to individual bigots in positions of authority. As a result, the discrimination that we find today more often has a narrow impact, perhaps influencing only a few hiring decisions, and does not warrant the use of a goal that will affect a great number of subsequent hires or promotions.

We do not know of any change in the actions of employers during the four years from 1983 to 1987 which would justify the conclusion that broad patterns of discrimination had diminished in importance, or that women and minorities faced a different kind of threat at the end of this period than they had faced at its beginning. As the Urban Institute reports above show, there are still broad patterns of disparate treatment affecting numerous persons at numerous employers.

Indeed, Judge Thomas may have come to his present views even if he were convinced of the continuing nature of broad-scale, entrenched discrimination. In his profile in The Atlantic Monthly, he seemed to agree with the author's conclusions:<sup>83</sup>

If an employer over the years denies jobs to hundreds of qualified women or blacks because he does not want women or blacks working for him, Thomas is not prepared to see a "pattern and practice" of discrimination. He sees hundreds of local, individual acts of discrimination. Thomas would require every woman or black whom that employer had discriminated against to come to the government and prove his or her allegation. The burden is on the individual. The remedy is back pay and a job. "Anyone asking the government to do more is barking up the wrong tree," Thomas says.

Thomas has made it EEOC policy to shy away from class-action suits. He doesn't want to see blacks

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<sup>83</sup> Juan Williams, A Question of Fairness, The Atlantic Monthly, February 1987, at pp. 71, 79 [hereinafter "1987 Atlantic Profile"].

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treated as numbers. So he favors aggressive attacks on employers only when they are proved to have discriminated against particular persons. "My view is that the most vulnerable unit in our society is the individual. And blacks, in my opinion being one of the most vulnerable groups, should fight like hell to preserve individual freedoms so people can't gang up on us. Blacks are the least favored group in this society. Suppose we did band together, group against group -- which group do you think would win? We're breaking down everything, ten percent for the blacks, twenty-five percent for the women, two percent for the aged, everything broken out according to groups. Which group always winds up with the least? Which group always seems to get the hell kicked out of it? Blacks, and maybe American Indians."

This is a philosophy incapable of redressing patterns of discrimination. Placing repetitive burdens on victim after victim ensures that some will falter, ensures that the EEOC's resources would be wasted in litigating the same question over and over against the same defendant, and ensures that much of the employer's discrimination will go unremedied.

D. Judge Thomas's Implementation of His Views of Employment Discrimination While He Was Chairman of the Equal Employment Opportunity Commission

1. Role of the EEOC Chairman

As Chairman of the Equal Employment Opportunity Commission, Judge Thomas was responsible for directing the administrative processing<sup>44</sup> of scores of thousands of employment discrimination charges annually. In addition, as Chairman he participated with other Commissioners in setting EEOC policy, and in

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<sup>44</sup> Such administrative processing includes intake, investigation, deciding whether there is reasonable cause to believe that discrimination occurred, and issuance to charging parties of Notices of Right to Sue.

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determining whether the Commission would bring suit on particular charges of discrimination. He had the right to file Commissioner's charges of discrimination to challenge broad patterns of discrimination. He dealt with other Federal agencies sharing responsibilities for equal employment opportunity and for personnel policy, including the U.S. Department of Justice, the U.S. Department of Labor and its Office of Federal Contract Compliance Programs, and the U.S. Office of Personnel Management.

The powers and duties of the Chairman affect every aspect of the EEOC's activities. Charge intake officials and investigators look for guidance to the statements and actions of the Chairman, and reflect that guidance in their write-up of charges and in their performance of investigations. EEOC attorneys look to the Chairman's statements and actions for guidance on the kinds of lawsuits the Commissioners will authorize for filing. All of these officials will rely on such guidance to avoid wasting their time working on claims of discrimination which the Commission will not pursue.

Nor is this effect limited to the EEOC itself. Because of President Carter's Executive Order 12067, issued July 1, 1978, the EEOC is the lead agency for the development of EEO policy.<sup>35</sup> Until policy changes are formally voted by the Commission, the statements and actions of the Chairman are other agencies' best

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<sup>35</sup> Sec. 1-201 of the Executive Order, 43 Fed. Reg. 28967 (1978), states in part: "The Equal Employment Opportunity Commission shall provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations and policies which require equal employment opportunity ...."

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guidance as to the policies the EEOC will adopt in the future, and as to which they will then have to consult, and possibly pay deference.

The EEOC and its Chairman are not, of course, free to adopt any policies they wish. They are constrained by the language and intent of Congress in enacting the statutes they administer --- Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Age Discrimination in Employment Act of 1965 --- and the decisions of the courts interpreting those statutes. With the limited exception of charges of discrimination involving Federal agency employers, Congress has not given the EEOC the power to issue binding decisions under any of these statutes. The EEOC may only issue advisory decisions; the courts have been given the authority to make binding determinations on the meaning of the law and on its application in particular cases. The administrative enforcement of the EEO laws cannot be effective unless it is consistent with the warp and woof of controlling caselaw interpreting those laws.

It is obvious that the Chairmanship of the EEOC is an extremely influential position. While every public official has the duty to be accurate and fair as to the law and its application, a Chairman of the EEOC is under a heightened duty of accuracy and fairness.

As Chairman, Judge Thomas failed this test, with results which seriously harmed the government's enforcement of Title VII. Consistency in the statement of agency positions is

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important to allow staff to perform their jobs under clearly understood principles and in allowing employers to shape their personnel actions in accordance with the law. Unfortunately, Judge Thomas's abrupt shifts of positions on major questions of Title VII interpretation after President Reagan's 1984 re-election left the agency and the public in confusion.

Judge Thomas's views on the breadth of discrimination also had a major impact in reducing the effectiveness of the fight against discrimination. During the 1980's, fewer and fewer private attorneys and the clients they represented were able to afford decade-long litigation against broad patterns of discrimination. Broad patterns of discrimination continued, but in subtler forms which required a much greater investment of time and money to prove. The courts were imposing ever-greater evidentiary burdens on plaintiffs, thus requiring greater and greater reliance on expert testimony while the courts were simultaneously suggesting --- and then holding --- that a winning plaintiff could not recover expert fees even if the expert testimony had been essential.

The result was that fewer and fewer private attorneys were willing to file class actions challenging broad patterns of discrimination, and could only afford to handle individual cases. Nationally, class action filings to enforce the civil rights laws went down dramatically, from 1,174 new class actions filed in the judicial reporting year ending June 30, 1976 to 48 filed in the judicial reporting year ending June 30, 1987. At the same time,

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total job discrimination filings went up dramatically, from 5,321 filed in the judicial reporting year ending June 30, 1976 to 8,993 filed in the judicial reporting year ending June 30, 1987.<sup>46</sup>

In these circumstances, enforcement of Title VII by the EEOC became even more important. When the private bar can no longer afford to tackle broad problems of discrimination, there is no effective substitute for governmental enforcement. The EEOC's shifting of its emphasis from broad cases to individual cases simply replicated what the private bar was doing, and did nothing to fill the gap which only the EEOC could fill.

2. Background and Context of the Supreme Court's Unanimous 1971 Decision in Griggs v. Duke Power Co.

One of the most important developments in the legal effort to dismantle racial discrimination and exclusion in hiring was the challenge to discriminatory employment tests and diploma requirements having little or no relation to job performance.

Widespread legal attention to the possibility of racial differences in the ability of tests to make predictions about the future performance of students or employees did not arise until the beginning of the substantial dismantling of segregation in the 1960's. "In a society in which blacks were openly excluded from jobs, the idea of devoting effort to studying the problem of

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<sup>46</sup> Administrative Office of the U.S. Courts, the various Annual Reports of the Director and unpublished statistics available to the public.

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subtle exclusion through tests hardly seemed worthwhile."<sup>87</sup>

Challenges to employment tests as discriminatory began before Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., was enacted. In the debate leading to passage of the Act, there was extended discussion of a decision by a hearing examiner for the Illinois Fair Employment Commission, Myart v. Motorola Co.<sup>88</sup> The case sparked so much interest because the hearing examiner suggested that standardized tests could not be used, even if the employer's legitimate interests required their use. This led to concern whether passage of Title VII would require the same result.

Sen. Tower proposed an amendment to immunize from the reach of Title VII "professionally developed ability tests" which are "designed to determine or predict whether such individual is suitable or trainable with respect to his employment . . ."<sup>89</sup> The amendment was defeated because, in the words of Senator Case, it would authorize any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute."<sup>90</sup> Two days later, Senator Tower proposed an amendment

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<sup>87</sup> George Cooper and Richard B. Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harvard Law Review 1598, 1645 (1969)

<sup>88</sup> The proceedings were reprinted in 110 Cong. Rec. 13492-13505 (June 11, 1964)

<sup>89</sup> 110 Cong. Rec. 13492.

<sup>90</sup> 110 Cong. Rec. 13504.

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which became section 703(h) of the Act, immunizing only those professionally developed ability tests which are "not designed, intended or used to discriminate".<sup>91</sup>

Thus, Congress accepted the proposition that even a good-faith qualification required by an employer would be unlawful if the qualification requirement had an exclusionary effect on minorities or women and was not job-related. In its brief as amicus curiae to the Supreme Court in Griggs v. Duke Power Co.<sup>92</sup>, the Nixon Administration supported this principle.

### 3. The Griggs Decision

Griggs upheld the disparate-impact theory of discrimination recognized by Congress in enacting the statute. Duke Power had imposed high school degree and testing requirements for the company's better-paying jobs in the Operations, Maintenance, and Laboratory and Test Departments. The unappealed findings of the district court specified that the jobs in these departments included positions as trainee, as Power Station Control Operator, as Pump Operator, as Utility Operator, as Mechanic, as Electrician-Welder, as Machinist, as Lab and Test Assistant, as Lab and Test Technician, and as supervisors.<sup>93</sup>

Existing employees could be assigned to one of these departments with either a high school degree or a passing score

<sup>91</sup> 42 U.S.C. § 2000a-2(h).

<sup>92</sup> 401 U.S. 424 (1971).

<sup>93</sup> See Griggs v. Duke Power Co., 292 F Supp. 243, 245 note 1 (M.D.N.C., 1968).

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on certain personnel tests. Outside applicants for these better-paying departments had to meet both the high-school degree requirement and the testing requirement.

The Supreme Court found that while the company had not acted with a discriminatory purpose, neither the tests nor the degree requirement had been "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."<sup>84</sup> They were therefore unlawful. If these selection practices had been proven to be necessary and related to job performance, however, their use would have been lawful notwithstanding their exclusionary effect.

4. Enforcing the Griggs Decision: Guidelines on Employee Selection Procedures, and Subsequent Decisions

Griggs held that the 1966 and 1970 EEOC Guidelines on Employee Selection Procedure were supported by the Act and its legislative history, that there was "good reason to treat the guidelines as expressing the will of Congress", and that they are "entitled to great deference."<sup>85</sup> The Court re-affirmed this ruling in Albemarle Paper Co. v. Moody.<sup>86</sup> Even the partial reversal of Griggs in Wards Cove Packing Co. v. Atonio,<sup>87</sup> left some features of Griggs untouched: the initial statistical focus

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<sup>84</sup> 401 U.S. at 431

<sup>85</sup> 401 U.S. at 434

<sup>86</sup> 422 U.S. 405, 430-36 (1975)

<sup>87</sup> 490 U.S. 642 (1989)

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on whether the test or other employment practice disproportionately affected minorities or women, the refusal to accept a mere assumption or assertion that an exclusionary practice is job-related, and the employer's burden of at least producing meaningful evidence that the exclusionary practice is job-related.<sup>98</sup> These surviving common aspects of the Court's disparate-impact decisions are the ones which concern us here.

The Department of Justice, the Department of Labor, and the Office of Personnel Management also have some responsibility for enforcement of the fair employment laws. Thus, in 1978, these three agencies joined the EEOC in issuing the Uniform Guidelines on Employee Selection Procedures ("UGESP"),<sup>99</sup> which incorporated the principles expressed in Griggs.

#### 5. The Practical Importance of the Griggs Decision

"The use of tests and similar requirements can be an engine of exclusion of minorities far more efficient than any individual's personal intent."<sup>100</sup> Griggs provided an effective means of challenging these practices. The treatise on employment discrimination law most widely used by practitioners describes Griggs as "the most important court decision in employment

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<sup>98</sup> Prior to Wards Cove, the employer had the burden of persuasion on this point

<sup>99</sup> 29 C.F.R. Part 1607

<sup>100</sup> Richard Talbot Seymour, Why Plaintiffs' Counsel Challenge Tests, and How They Can Successfully Challenge the Theory of 'Validity Generalization', 33 Journal of Vocational Behavior 331, 333 (1988).

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discrimination law.<sup>101</sup>

As a result of Griggs, many employers stopped using off-the-shelf tests which arbitrarily<sup>102</sup> excluded minorities and women from job opportunities. Many employers had assumed from the assurances of test developers that the tests automatically had a useful function, and learned otherwise when Griggs, Albemarle Paper, and the Guidelines required them to determine whether the tests were in fact useful. As a result of Griggs, arbitrary height-and-weight requirements were ended for many jobs, including positions as police officers; this had the effect of opening up these jobs to the women, Hispanics, and Asians interested in these public-safety careers. The elimination of arbitrary high-school degree requirements opened up many industrial jobs for blacks, particularly in the South where many blacks had been required by economic circumstances to leave school to work as agricultural laborers, but were then being displaced from agriculture by increasing mechanization.

The Executive Officer of the American Psychological Association testified before Congress in 1985 that "psychologists generally agree that the caliber of employment practices in organizations has improved dramatically since publication of the

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<sup>101</sup> Barbara Lindemann Schlei and Paul Grossman, Employment Discrimination Law (Washington, D.C., Bureau of National Affairs, 2nd ed., 1983) at 5 (footnote omitted).

<sup>102</sup> An exclusion from job opportunities which is not job-related is arbitrary.

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existing Uniform Guidelines in 1978".<sup>103</sup> Few management or plaintiffs' attorneys would disagree that Griggs led many employers to examine their employment practices more closely, and to end their use of tests and other practices which were unrelated to job performance. Any weakening of Griggs leading to the general re-introduction of such tests would defeat the purpose of Title VII. "The widespread use of such tests would reestablish a racially segregated job structure that would be the same in effect, if not intent, as the old pattern of segregation and hierarchy that Title VII was designed to break down."<sup>104</sup>

6. Judge Thomas's Initial Support for Griggs and for the Uniform Guidelines

As late as 1983, Judge Thomas's public statements provided strong support for Griggs and the Uniform Guidelines:<sup>105</sup>.

We know that employment discrimination today often results from facially neutral employment policies and practices. Our experience in administering fair employment laws for over the past 18 years has provided a greater knowledge and understanding of the complex and pervasive manner in which employment discrimination continues to operate. Experience has taught us all that apparently neutral employment systems can still produce highly discriminatory effects. They can also perpetuate the effects of past discrimination.

<sup>103</sup> On the Subject of Uniform Guidelines on Employment Selection Procedures, Hearings before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess., October 2, 1985 (Testimony of Leonard Goodstein, p. 2).

<sup>104</sup> Barry L. Goldstein, and Patrick O. Patterson, Turning Back the Title VII Clock: The Resegregation of the American Work Force through Validity Generalization, 33 Journal of Vocational Behavior 452, 457 (1988).

<sup>105</sup> March 17, 1983 Speech to A.S.P.A., Griggs note 74, at 4 (emphasis in original).

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While recognizing that the Uniform Guidelines might need to be updated on occasion, he cautioned against any substantial weakening:<sup>106</sup>

We have recognized, for example, that there can be problem areas in the very guidelines for which we have pledged our continued support. But it should also be remembered that the development of the EEOC guidelines was an exceedingly lengthy process. It involved exhaustive public comment, public hearings and analysis. Any future decision to reassess these important provisions will be made with an eye to that kind of deliberate procedure -- one in which our aim must be limited to measuring the performance of the guidelines as set against their critical purpose. As long as they serve that purpose effectively, there is no present need for revision. We are not dealing with common zoning ordinances here. Whole classes of people in this country have come to rely on the vital protection offered by measures such as these.

In further support of the continuation of the Guidelines, Judge Thomas emphasized the need for stability and predictability:<sup>107</sup>

The policies advanced by the EEOC Guidelines on Employee Selection Procedures ... have been given the force of law; they have given rise to a measure of certainty, stability in the employment arena; setting legal standards upon which both employers and employees can rely.

7. Judge Thomas's Abrupt Change of View After the 1984 Election

Judge Thomas's publicly stated view of Griggs, the Uniform Guidelines, and their importance changed abruptly after President Reagan's landslide 1984 re-election, without any public explanation for the shift or for its timing. He began the change a few days after the re-election, stating that he had "a lot of

<sup>106</sup> Id. at 11 (emphasis supplied)

<sup>107</sup> Id. at 9.

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concern" about the Uniform Guidelines, and that there was a good possibility there will be "significant changes".<sup>108</sup>

In a newspaper interview three weeks later, he stated that he thought the affirmative-action decision in Firefighters Local Union No. 1784 v. Stotts<sup>109</sup> somehow "modified Griggs"<sup>110</sup> or drew Griggs into question.<sup>111</sup> Judge Thomas's statement in the interview that "recent Supreme Court decisions preclude preferential treatment for anyone who was not actually found to be a victim of discrimination" makes clear that the decision to which he referred was Stotts; no other recent decision fits that description.

On its face, this contention is difficult to understand. The Court's opinion in Stotts did not even mention either Griggs or the disparate-impact doctrine. Stotts involved a consent decree establishing hiring goals for blacks as a remedy for past discrimination. The consent decree came into conflict with a seniority system when the fire department implemented layoffs. In order for blacks to maintain the percentage representation they had gained in various Fire Department positions,

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<sup>108</sup> Policy Changes, Aggressive Enforcement, Will Mark Next Term at EEOC, Thomas Says, BNA Daily Labor Reporter, November 15, 1984 pp A-6, A-8 [hereinafter, "November 15, 1984 Policy Changes"];

<sup>109</sup> 467 U.S. 561 (1984).

<sup>110</sup> Juan Williams, EEOC Chief Cites Abuse of Racial Bias Criteria, Washington Post, December 4, 1984, at A13 [hereinafter "December 4, 1984 EEOC Chief Cites Abuse"].

<sup>111</sup> Robert Pear, Changes Weighed in Federal Rules on Discrimination, N.Y. Times, December 3, 1984, at A1.

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the trial court ordered that a number of more senior, white firefighters be laid off ahead of less-senior blacks. The Court reversed the Sixth Circuit's and the trial court's finding that the seniority system was not a bona fide seniority system within the meaning of § 703(h) of Title VII, which the lower courts had relied upon to state that the layoffs would have a racially discriminatory effect. The Court held that competitive seniority --- an effective protection against the layoffs --- could not be given to blacks who were not actual victims of past discrimination.

Compounding the problem of his meaning, Judge Thomas went on in one of these interviews to state incorrectly that the employment practices in Griggs had been applied to persons seeking ditch-digging jobs, and that Griggs had been taken too far:<sup>112</sup>

"I'm not saying Griggs [v. Duke Power Co.] is bad law," Thomas said. "In that case they were asking that workers have a high school diploma to dig ditches. But the way Griggs has been applied has been overextended and over-applied."

This description of Griggs had the facts and import of the case exactly backwards, an error surprising for the head of an enforcement agency when discussing the most important case construing the law he is charged with enforcing.

It seems a fair inference from this statement that Judge Thomas favored limitation of the Griggs doctrine to unskilled laboring positions. Such a limitation would have robbed

<sup>112</sup> December 4, 1984 EEOC Chief Citrus Abuse, supra note 110.

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Griggs of most of its value. Exclusionary practices are rarely applied to jobs at the bottom of the socio-economic ladder, and are much more frequently applied to higher-level positions, including higher-level trainee positions such as some of the jobs in Griggs itself. The Lawyers' Committee testified before Congress shortly after this statement was made, and commented on the importance of the Uniform Guidelines:<sup>113</sup>

Much of the job advancement of members of minority groups and of women over the last two decades has been a direct result of these rules. The "reasonably certain" awards of back pay against employers, even if they are acting in good faith, does in fact spur employers to take a second look at exclusionary practices before suit is brought, and to look for alternatives which will be just as good in determining real qualifications and which will not have the exclusionary effect. This "spur" would not work, however, if employers did not know in advance the standards by which their tests and other selection standards would be judged.

Notwithstanding Judge Thomas's earlier statements on the need for caution in considering changes to the Uniform Guidelines, and on the need of employers and employees alike for stability, at some time in 1984 he decided to undertake a complete review of the Guidelines. An internal EEOC document outlining the scope of the proposed review included questions on whether there should be any Uniform Guidelines at all.<sup>114</sup> The revelation of this inquiry triggered a wave of Congressional hearings and caused substantial

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<sup>113</sup> Prepared statement of William L. Robinson and Richard T. Seymour on Behalf of the Lawyers' Committee for Civil Rights Under Law, Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 98th Cong., 2d Sess. at 10 (December 14, 1984).

<sup>114</sup> Id., Appendix A.

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uncertainty among the persons and organizations affected by the Uniform Guidelines.

In a February 1985 report to the Office of Management and Budget on the Commission's regulatory agenda, Judge Thomas wrote his sharpest criticism of the Griggs rule:<sup>115</sup>

The premise underlying UGESP is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins who are hired or promoted by that employer. . . . UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race-and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination."

The premises underlying UGESP are conceptually unsound because (1) blacks, Hispanics, other minorities, and women are not inherently inferior, and (2) statistical disparities in the rates at which an employer hires or promotes people of different races, sexes, or national origins may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination. Moreover, the use of a mechanical statistical rule to define "discrimination" encourages employers to discriminate in order to secure the workforce composition necessary to satisfy the statistical rule.

The critical point is that, although Griggs and even Wards Cove agree that an exclusionary practice should not simply

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<sup>115</sup> Office of Management and Budget, Regulatory Program of the United States Government (August 8, 1985) (Statement of Clarence Thomas), at 523-24, reprinted in Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess., at 127-28 (October 2, 1985).

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be assumed to be proper and that evidence to show its propriety is necessary, Judge Thomas has criticized this requirement as assuming "some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people". His reference to even this remaining common ground between Griggs and the later decision in Wards Cove as outside "the plain meaning of the term 'discrimination'" necessarily raises the question whether he continues to accept this basic premise of Griggs, or whether he would go even farther than Wards Cove and abolish the disparate-impact standard altogether.

Such a change would restrict Title VII to cases of intentional discrimination, and leave minorities and women at the mercy of employers who would then have little incentive to curb their use of exclusionary practices. Indeed, employers which intended to limit their employment of blacks, Hispanics, or women could adopt paper-and-pencil tests, strength tests, and similar requirements secure in the knowledge that it would be extremely difficult to prove their wrongful intent in adopting such requirements but the results would be the same as with the more readily provable direct forms of intentional discrimination.

The EEOC continued the issue of changes in the Uniform Guidelines on its regulatory agenda for some years, but the agency never did announce proposals for specific changes. The Uniform Guidelines were still intact when Judge Thomas left office as Chairman to take up his judgeship on the U.S. Court of

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Appeals for the District of Columbia Circuit.

8. Judge Thomas's Views on the Use of Statistical Evidence in Discrimination Cases

The Supreme Court has repeatedly held that proper statistical evidence taking job qualifications, availability and employer explanations into account can in appropriate cases be sufficient to prove discrimination.<sup>116</sup> Few employers admit that they are discriminating, and the nature of their actions has to be deduced from all of the employment decisions they have made. In Teamsters, the Court quoted with approval an appellate decision stating that "In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."<sup>117</sup> In disparate-impact cases, the plaintiff has the burden of persuasion that the challenged requirement disadvantages members of minority groups or women to a substantially greater extent than whites or men; such proof is necessarily statistical.

In discussing statistical evidence, some important qualifications must be kept in mind. First, statistical evidence has no weight unless it is both accurate and appropriate. Where there are legitimate qualification requirements, such as a teaching degree for a position as teacher or an engineering degree for a position as engineer, a plaintiff has the burden of

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<sup>116</sup> E.g., International Brotherhood of Teamsters v. United States, 431 U S 324, 339-41 (1977), Dorhard v. Rawlinson, 433 U S 321, 329-31 (1977)

<sup>117</sup> 431 U S at 339 note 20 (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), cert. den., 404 U S 984 (1971)).

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taking such qualifications into account in presenting any statistical proof.

Second, a plaintiff's statistical evidence never creates a conclusive presumption of discrimination. A court must always consider the defendant's explanation of the statistics, and must always consider any alternative statistical analysis offered by the defendant. The Supreme Court has made clear that a proper statistical showing, not adequately rebutted by the defendant, is sometimes enough to prove discrimination. No matter how strong or appropriate the statistical proof, therefore, the most it can do is to create a rebuttable presumption of discrimination.

Third, in the judgment of the Lawyers' Committee there were legitimate grounds for the Chairman or anyone else to criticize the EEOC's approach to statistical proof in some of its cases. Sometimes, the EEOC's presentation was too simple; sometimes, it was based on unchecked assumptions on the availability of minorities or women for some kinds of jobs. Sometimes, the EEOC did not pay careful enough attention to the employer's explanations and determine whether nondiscriminatory factors accounted for substantial parts of the racial, national origin or gender disparities on which it relied. Sometimes, the EEOC failed to develop the kinds of non-statistical testimony which would have made its statistical case much more convincing. We cannot criticize Judge Thomas for calling attention to such problems. His former agency, and other agencies, bring bad cases

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from time to time. Any serious attempt to reduce the number of such cases is commendable.

However, our concern is that Judge Thomas's general criticisms of statistical proof in connection with his statements on the Griggs rule and his attacks on the Uniform Guidelines exceeded the dimension of the problems mentioned above, and seemed to disregard the value of statistical proof altogether. In his August 8, 1985 statement of the EEOC's regulatory program, he referred to provisions of the Uniform Guidelines on the determination of adverse impact --- which is the same as the threshold burden on the plaintiff in a disparate-impact case --- as a "mechanical statistical rule that has no relationship to the plain meaning of the term 'discrimination.'" Later in the same document, he stated that "statistical disparities ... may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination."<sup>118</sup>

These statements are extremely troubling. The reference to "the plain meaning of the term 'discrimination'" has been discussed above. The latter statement may reflect an unwillingness to credit statistical proof even where the defendant has no credible rebuttal to the statistical evidence and the plaintiff has gone as far as possible in showing that a substantial disparity exists even after taking into account racial, national origin

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<sup>118</sup> August 8, 1985 Statement of Clarence Thomas, full quotation set out in text, supra at 45-46.

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or gender differences in availability, in the possession of legitimate qualifications, and in other relevant factors. Such an approach would have the result of providing immunity for the many instances of discrimination where no direct proof of discriminatory purpose is available, and where discrimination can only be inferred from the results of the employer's actions and the absence of any credible explanation.

This type of statement was taken by some EEOC district offices as an indication that they were not allowed to consider statistical evidence offered by a charging party, or that they were only allowed to consider such evidence where some unusual condition was met. In one case, we were told that a charging party's statistics could only be relied upon if the charging party produced a witness who had direct personal knowledge of intentional discrimination. In another case, a plaintiff's attorney was told that a charging party's statistics could only be relied upon if the charging party produced a list of all victims of the discrimination in question. We think it unlikely that Judge Thomas gave these types of instructions to the district offices; instead, these misguided policies seem to us to reflect the confusion of EEOC officials across the country arising from Judge Thomas's repeated criticisms of statistical evidence without his having clarified what he saw as the proper role, if any, of statistical proof.

In fact, the type of lawsuit the Commission was likely to bring changed during Judge Clarence Thomas' tenure from the

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type of high-impact cases requiring statistical proof to cases brought on behalf of individuals alleging specific acts of discrimination against themselves.<sup>119</sup>

E. Judge Thomas's Positions on Affirmative Action

1. Overview

Judge Thomas has consistently voiced reservations as to the use of race- and gender-conscious remedies for discrimination. Despite his personal beliefs, during Judge Thomas' first two years at the EEOC, he usually was an advocate for existing EEOC policies including affirmative action. This stance often put him at odds with others in the Reagan Administration -- most frequently, William Bradford Reynolds, Assistant Attorney General For Civil Rights. After President Reagan's re-election, Judge Thomas began to advocate publicly dramatic changes in EEOC policy. In an interview immediately after election day, Judge Thomas announced that, henceforth, the Administration would speak with one voice and that there would be concerted efforts to make EEOC policy consistent with the Administration's philosophy.<sup>120</sup>

Although Judge Thomas pledged a concerted effort after the election, he often thereafter took positions worse than the litigation positions of Mr. Reynolds' Civil Rights Division. Reynolds routinely relied on disparate-impact theory and thought

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<sup>119</sup> 1987 Atlantic Profile, supra note 83, at 79

<sup>120</sup> November 15, 1984 Policy Changes, supra note 108, at A-1.

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it proper, while Judge Thomas was attacking the theory; Reynolds routinely relied on the Uniform Guidelines while Judge Thomas battled to have them revised. In late 1987, Mr. Reynolds joined Judge Thomas in his opposition to the Guidelines.

For the next two years, Judge Thomas argued that under Stotts race- and gender-conscious remedies for discrimination were unconstitutional and inconsistent with Congressional intent and existing Supreme Court precedent. After the Supreme Court held in a series of decisions that United Steel Workers of America v. Weber<sup>121</sup> was still good law and that narrowly-tailored and adequately supported race- and gender-conscious remedies remained both constitutional and in compliance with Title VII,<sup>122</sup> Judge Thomas opposed such remedies on policy grounds.

These developments are set forth in greater detail below.

2. Judge Thomas's Views While a Member of President-Elect Reagan's Transition Team

Judge Thomas urged major changes in the direction of EEOC policy when he served, in December of 1980, on a Reagan Administration transition team preparing a report on civil rights

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<sup>121</sup> 443 U.S. 193 (1979).

<sup>122</sup> Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); and Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

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policy.<sup>123</sup> In that role, Judge Thomas drafted a memorandum which said:<sup>124</sup>

It appears that EEOC has made little effort to validate the assumptions underlying affirmative action and has not evaluated the effects of affirmative action on the lot of minorities, especially those who are disadvantaged. . . .

There appears to have been little effort made to determine whether disadvantaged minorities and women have actually been helped as a result of affirmative action. Nor does it appear that there has been any determination that the inadequacies which resulted in the disadvantage have been removed or whether they can be remedied by mere inclusion in the workforce.

In essence, EEOC has extended its authority to include voluntary affirmative action in the private sector without constitutional or statutory basis. Moreover, the assumption that this approach would help minorities and women overcome disadvantages caused by past discrimination has not been verified or reassessed.

The memorandum concluded that the EEOC:<sup>125</sup>

... should reexamine the assumptions underlying affirmative action, with special emphasis on determining whether there are non-employment and non-race-related causes of underrepresentation of minorities and women in certain areas.

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<sup>123</sup> The report was described in Major Change in EEOC Direction Likely Under New Chairman-Designate, BNA Daily Labor Reporter, February 22, 1982, p. A-3 (hereinafter cited as "February 22, 1982 Major Change").

<sup>124</sup> December 1980 Memorandum to the Reagan Administration from Clarence Thomas, quoted in February 22, 1982 Major Change, supra note 123, NEXIS pagination at 2-3.

<sup>125</sup> Id.

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3. Judge Thomas's Support for Goals and Timetables from His Appointment as EEOC Chairman in 1982 Until the 1984 Re-Election of President Reagan

(a) General Statements

Although his work on the civil rights transition team focused on EEOC policy, Judge Thomas was not initially appointed to a position at the EEOC, but instead was named Assistant Secretary for Civil Rights in the Department of Education. A year later, when he was nominated to be Chairman of the EEOC, Judge Thomas was given an opportunity to point the EEOC in the direction described in the transition team memorandum. However, the new Chairman's initial public statements and actions suggested that his personal opposition to race-conscious policies would not dramatically affect his administration of the EEOC.

Despite his earlier harsh words for affirmative action, Judge Thomas initially defended the use of goals and timetables. At his 1982 confirmation hearing as Chairman of the EEOC, Judge Thomas testified that:<sup>126</sup>

[T]here has been an overreliance on quotas in remedying past problems with respect to discrimination. I do not, however, believe that there should be a wholesale abandonment of any sort of numerical timetables, at least as monitoring devices.

In public remarks, Judge Thomas explained that much of the "heated debate and public confusion over affirmative action in fact stems from the confusion between flexible goals and

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<sup>126</sup> Hearing Before the Committee on Labor and Human Resources on the Nomination of Clarence Thomas To Be Chairman of the EEOC, 97th Cong., 2d Sess., at 16 (March 31, 1982)

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inflexible quotas".<sup>127</sup> Judge Thomas told BNA through an aide that he has "never been against goals and timetables when used properly for monitoring purposes. But when they are used as ends in themselves they become nothing more than quotas".<sup>128</sup>

In March, 1983, Judge Thomas told a women's organization that he continued to have questions about the effectiveness of group remedies, but supported affirmative-action remedies other than quotas "because the remedies which are truly necessary to make individual rights a meaningful reality are not yet on the books."<sup>129</sup> In April, 1983 Judge Thomas spoke to the Kansas City Bar Association, saying that "I have even supported the use of some so-called affirmative action remedies ... despite the social problems which can result from an over-reliance on them".<sup>130</sup>

(b) The Controversy Over the Justice Department's Position in Williams v. City of New Orleans

Early in Judge Thomas's tenure as Chairman of the EEOC, the Commission strongly disagreed with the Justice Department on the issue of the propriety of race-conscious prospective remedies under Title VII. A panel of the U.S. Court of Appeals for the Fifth Circuit had reversed the district court's denial of approval for a consent decree containing race-conscious relief in

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<sup>127</sup> Chairman Thomas Explains Views on Affirmative Action at EEO Conference, BNA Daily Labor Reporter, October 5, 1982, p. A-6

<sup>128</sup> Affirmative Action Program for Federal Agencies Under Revision, BNA Daily Labor Reporter, October 13, 1982, p. A-3

<sup>129</sup> March 30, 1983 Speech to Women Employed, supra note 75, at 14-15. The quotation is set out above at 25.

<sup>130</sup> April 28, 1983 Kansas City Bar Speech, supra note 76, at 22-23

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promotions. Williams v. City of New Orleans.<sup>131</sup> The court of appeals had voted to rehear the case an banc at the request of the Justice Department, which argued that such relief was impermissible under Title VII and violated the constitutional right of other officers to equal protection.<sup>132</sup>

Judge Thomas and the other Commissioners of the EEOC, surprised by this about-face in the federal government's civil rights enforcement strategy and disturbed at the Justice Department's failure to consult the EEOC before acting, sent a jointly-signed sharply worded letter on January 26, 1983 to Attorney General William French Smith, Solicitor General Rex Lee and Assistant Attorney General William Bradford Reynolds calling Justice's failure to consult with the EEOC "deplorable" and stating that:

Many of our lawsuits and conciliations under Title VII have resulted in the adoption and implementation of affirmative action goal relief programs which are currently being monitored and enforced by the Commission.

The Justice Department's brief, however, urges the Court of Appeals to reverse a panel decision by an an banc ruling on the ground that Title VII flatly prohibits courts from awarding any affirmative action relief which benefits individuals who were not specific victims of discrimination. This interpretation of Title VII is the direct opposite of the interpretations

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<sup>131</sup> 694 F.2d 987 (5th Cir., 1982) On the rehearing requested by the Justice Department, the court rejected the Justice Department's broad arguments but held that the district court did not abuse its discretion in refusing to approve the particular race-conscious relief at issue. 729 F.2d 1554 (5th Cir., 1984) (an banc)

<sup>132</sup> EEOC Chides Justice for "Deplorable" Action on New Orleans Police Case, BNA Daily Labor Reporter, February 1, 1983, p. A-2 [hereinafter "February 1, 1983 EEOC Chides Justice"].

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previously urged by both the Department of Justice and the Equal Employment Opportunity Commission. If this position is adopted by the courts, it could seriously affect our ability to enforce many existing judgments, consent decrees and settlement agreements entered into between this agency and employers over the last 11 years. ...

The EEOC Commissioners subsequently voted to file their own amicus brief in the City of New Orleans case supporting approval of the consent decree and arguing that neither Title VII nor equal protection prohibits a court from ordering race-conscious remedies.<sup>133</sup> In another letter to Attorney General William French Smith, Chairman Thomas informed Smith of the EEOC's substantive position in City of New Orleans and suggested that, though it would be beneficial if the Administration could speak with one voice on these issues, "considerable public benefit would result from squarely joining these important legal issues for consideration in the Fifth Circuit."<sup>134</sup> On April 5, 1983, bowing to intense pressure from the White House, the EEOC rescinded the decision to file its own brief in City of New Orleans.<sup>135</sup> Explaining the Commission's decision, Chairman Thomas stated, "The Commission decided it would be within the public interest not to file conflicting views on a legal issue involving a city government where the Justice Department has sole enforce-

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<sup>133</sup> EEOC May File Brief Opposing Justice Department Stand on Affirmative Action, BNA Daily Labor Reporter, March 7, 1983, p. A-10.

<sup>134</sup> March 21, 1983 Letter from EEOC Chairman Clarence Thomas to Attorney General William French Smith.

<sup>135</sup> EEOC Bows to White House Pressure, Says It Won't File New Orleans Brief, BNA Daily Labor Reporter, April 6, 1983, p. A-6.

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ment litigation responsibility."<sup>136</sup> Judge Thomas later asserted that this was the only time the White House ever attempted to influence EEOC policy.<sup>137</sup>

In a May 1983 interview, Judge Thomas reflected on his first year at the EEOC and on Williams v. City of New Orleans. He defended the substantive position in support of affirmative action which the Commission took in its letters to the Attorney General --- and which the EEOC had wished to defend in an amicus brief --- because it was supported by the law in effect at the time, but also mentioned his disagreement with affirmative action on policy grounds:<sup>138</sup>

"The debate over affirmative action is a real one," he observed. "There is argument about what the law should be, there is no argument about what the law is, and that's the position the Commission took in the Williams case," he said. "I disagree from an ideological viewpoint [with] what was being done in Williams, but the law supports what is being done. That was the opinion of our general counsel and that is precisely what I have an obligation to uphold."

(c) The Controversy Over the Labor Department's Proposed Changes in the Enforcement of Executive Order 11246

Executive Order 11246,<sup>139</sup> as amended, requires that prospective government contractors pledge not to discriminate and

<sup>136</sup> Id. at A-6

<sup>137</sup> Thomas Stresses EEOC's Independent Role in House Subcomm Oversight Hearing, BNA Daily Labor Reporter, October 27, 1983, p. A-6

<sup>138</sup> EEOC Chairman Thomas Reviews Role After a Year on the Job, BNA Daily Labor Reporter, May 26, 1983, p. A-9 [hereinafter "May 26, 1983 EEOC Chairman Thomas Reviews Role"].

<sup>139</sup> 30 Fed.Reg. 12319 (1965).

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to undertake "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."<sup>140</sup> The order is implemented by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). Since 1978, OFCCP's implementing guidelines have required that any government contractor with 50 or more employees and a contract of \$50,000 or more maintain a written affirmative action plan.<sup>141</sup> The plan must contain an analysis of the contractor's workforce to determine whether there are any occupations in which minorities or women are not being utilized in accordance with their availability, and must detail the steps being taken to address any problems with the utilization of women or minorities. Where there are deficiencies, the contractor is to establish "goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies".<sup>142</sup> "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."<sup>143</sup>

In September 1982, OFCCP announced that it planned to

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<sup>140</sup> *Id.*, § 202. ¶ 1 of the language to be inserted in government contracts

<sup>141</sup> 41 C.F.R. § 60-1.40 This requirement was published in the Federal Register on October 20, 1978 and November 3, 1978 43 Fed. Reg. 49240 (1978) and 43 Fed. Reg. 51400 (1978)

<sup>142</sup> 41 C.F.R. § 60-2.10, also in effect since 1978

<sup>143</sup> 41 C.F.R. § 60-2.12(e), also in effect since 1978.

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issue revised guidelines under Executive Order 11246 by the end of 1982.<sup>144</sup> The proposed revisions were controversial, in part because they raised the threshold for the written affirmative action plan requirement to contractors with 100 or more employees and a contract of at least \$100,000 and in part because they cut back on the use of pre-award audits. When they were submitted to the EEOC for review, the Commissioners, including Chairman Thomas, objected to portions of the guidelines as contrary to established equal opportunity policy.<sup>145</sup>

In hearings before the Subcommittee on Employment Opportunities of the House Education and Labor Committee on April 15, 1983, Chairman Thomas voiced the Commission's view that the proposals were not stringent enough and would create the possibility of a contractor's being in compliance with OFCCP's regulations but susceptible to a finding of discrimination under Title VII of the Civil Rights Act of 1964.<sup>146</sup>

Judge Thomas attacked several aspects of the proposed regulations which set lower standards than those required by Ti-

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<sup>144</sup> EEOC Chairman Thomas Announces New Emphasis on Training and Education, BNA Daily Labor Reporter, September 30, 1982, p. A-5. The article reported on the proceedings of the Fifth Annual Equal Employment Opportunity Conference sponsored by the Federal Bar Association and the Bureau of National Affairs Solicitor of Labor Timothy Ryan discussed the OFCCP proposals.

<sup>145</sup> EEOC Voices Concern over OFCCP Rules, Must Comment by April 12, BNA Daily Labor Reporter, March 22, 1983, p. A-3. The EEOC reviewed the proposed revisions pursuant to Section 715 of Title VII and Executive Order 12067 which give the EEOC advisory authority for coordinating all regulations, directions, and policies of executive agencies relating to equal employment opportunity.

<sup>146</sup> 1983 Oversight Hearings on the OFCCP, *supra* note 81, at 64. see also Collyer Tells Subcommittee Not To Expect OFCCP's Affirmative Action Rules for Sixty Days, BNA Daily Labor Reporter, April 15, 1983, p. A-14.

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tile VII, including too narrow an approach to the determination of the availability of women and members of minority groups, by "failure to include in their definition of 'availability' minorities and women whom the contractor can reasonably train". He expressed concern that OFCCP had already implemented certain policy changes without having published the changes in the Federal Register for public comment, such as orally instructing OFCCP field staff that contractors would not be permitted to establish hiring goals that exceed the proposed narrow definition of "availability."<sup>147</sup> Judge Thomas was concerned by this limitation on the use of goals and timetables.

4. Judge Thomas's Positions on Affirmative Action After President Reagan's 1984 Re-Election

(a) His Disapproval of Affirmative Action

In an interview printed on November 15, 1984, just days after Reagan's reelection, Judge Thomas carried these themes further. He told the Daily Labor Reporter that the next term would be marked by concerted efforts to promote the President's position on affirmative action:<sup>148</sup>

EEOC's next four years will be marked by concerted efforts to set forth the Reagan Administration's position on affirmative action --- favoring victim-specific remedies and moving away from quotas and proportional representation in both its conciliation efforts and court-approved settlements --- Chairman Clarence Thomas says.

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<sup>147</sup> 1983 Oversight Hearings on the OFCCP, *supra* note 81, at 64-65

<sup>148</sup> November 15, 1984 Policy Changes, *supra* note 108, at A-6, A-7.

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"I don't appreciate reading in the paper that [EEOC] agreed to some settlement with quotas in it," he told BNA. In the future, the five-member Commission will be working to see that its philosophy is carried out on the field and that its policy --- "not filtered and translated" --- is carried out by Commission staffers.

Notwithstanding his prior recognition of the utility of goals and timetables as instruments by which to measure an employer's progress in remedying the effects of its past discrimination, he stated:<sup>149</sup>

"People have tended to take comfort in these numbers [goal and timetable requirements]," he contended. "They think that somehow hiring by these numbers --- even without any oversight or monitoring --- enough was being done. I think that's baloney."

Further notwithstanding his earlier support for goals and timetables as monitoring devices, in 1987 he criticized them and their proponents:<sup>150</sup>

Goals and timetables, long a popular rallying cry among some who claim to be concerned with the right to equal employment opportunity, have become a sideshow in the war on discrimination.

He specifically criticized their use as a monitoring device, because this "allows an employer to hide continuing discrimination behind good numbers."<sup>151</sup>

Judge Thomas's comments, although predicting a new direction for the EEOC as a whole, could only reflect his own views. In a subsequent interview, he acknowledged that the

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<sup>149</sup> Id. at A-7

<sup>150</sup> Affirmative Action Goals, *supra* note 78, at 402.

<sup>151</sup> Id. at 407.

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Commission's view on affirmative action for non-victims of discrimination was "evolv[ing]," but he insisted that the tendency of the Commission was moving "very strongly away" from approving affirmative action for persons not proven to be individual victims of discrimination.<sup>152</sup>

Despite the fact that the EEOC's position on the issue was far from settled, in late 1985 the EEOC's acting General Counsel Johnny J. Butler began orally instructing regional EEOC attorneys not to include goals and timetables in settlements sent to the Commission for approval because it was his assessment that a three-member majority of the Commission would not approve the use of goals and timetables.<sup>153</sup> Regardless of his earlier disapproval of OFCCP's changes in policy without bothering to go through the public procedures required for such changes,<sup>154</sup> Judge Thomas agreed that Mr. Butler's action was taken pursuant to a *de facto* policy which had not been submitted to the full Commission:<sup>155</sup>

"As a practical matter, there are at least three commissioners who are opposed to the use of quotas," Butler said, using the term interchangeably with goals and timetables. "All three of them have said, 'Johnny,

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<sup>152</sup> EEOC Moving Toward Victim-Specific Remedies, Chairman Thomas Predicts BNA Daily Labor Reporter, March 5, 1985, p. A-3 (NEXIS pagination at 2)

<sup>153</sup> EEOC'S Move Away From Goals and Timetables Not Finally Resolved, Commissioner Says, BNA Daily Labor Reporter, February 12, 1986, p. A-9 (NEXIS pagination at 1)

<sup>154</sup> See the discussion above at 61.

<sup>155</sup> Howard Kurtz, EEOC Drops Hiring Goals, Timetables, Washington Post, February 11, 1986, pp. A1, A6

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you shouldn't be bringing any more quota cases.'"

EEOC Chairman Thomas said the de facto policy has been in effect for about a year as the commission considers proposed legal settlements.

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Thomas said he will put the new policy before the full commission, but could not say when. "It is not a burning issue with me," he said.

Meanwhile, in 1986 and 1987, the Supreme Court decided a string of cases which together demonstrated rather conclusively that race-conscious policies were -- in many circumstances -- acceptable remedies for discrimination.<sup>156</sup> Judge Thomas expressed his personal disagreement with each of these decisions.<sup>157</sup> Judge Thomas specifically expressed great disappointment at the Court's decision in Johnson:<sup>158</sup>

I thought that where the Court was going in its previous cases was to say that there needed to be a finding of egregious discrimination before conscious remedies in the form of quotas or goals were needed. In this case, I think they went far beyond what I thought the Court would do. This is basically throwing out any kind of pretense that explicit race-conscious remedies have to be predicated on a finding of discrimination. It's just social engineering, and we ought to see it for what it is. I don't think the ends justify the means, and we're standing the principle of nondiscrimination on its head -- it's simple as that -- and we're standing the legislative history of Title VII on its head.

At his renomination hearing in 1986, Judge Thomas was pressed for his personal views on the use of goals and timeta-

<sup>156</sup> These decisions are listed in note 122 above.

<sup>157</sup> Affirmative Action Goals, *supra* note 78, at 403 note 3

<sup>158</sup> Anger and Elation at Ruling on Affirmative Action, *New York Times*, March 29, 1987, at D1, col. 1.

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bles, both as a remedy and as part of voluntary affirmative action programs, in light of the Supreme Court rulings in the Sheet Metal Workers<sup>159</sup> and City of Cleveland<sup>160</sup> cases, allowing race-conscious relief for persons not themselves proven to have been identified victims of discrimination. Judge Thomas replied that he disapproved of the decisions, but would abide by them.<sup>161</sup>

With much of the legal basis for his arguments against goals and timetables undermined, Judge Thomas returned to themes that he had emphasized in the early years of his tenure at EEOC, particularly the argument that race-conscious hiring programs are bad public policy. In a 1987 article in the Yale Law & Policy Review, Judge Thomas set out fully his case against goals and timetables.<sup>162</sup> He argued that goals and timetables are ineffective and possibly harmful for the following reasons: (1) they allow employers to hide behind a "good bottom line," (2) they fail to address the opportunity for upward mobility after hiring, (3) they are premised on the "dubious assumption" that actual

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<sup>159</sup> Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986). The Supreme Court upheld a race-conscious membership order which had been imposed on a union found to have discriminated and to have resisted compliance with earlier remedial orders.

<sup>160</sup> Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). The Supreme Court upheld the approval of a race-conscious affirmative action plan established by a consent decree as within the remedial authority of Title VII.

<sup>161</sup> Hearing Before the Senate Committee on Labor and Human Resources on the Nomination of Clarence Thomas To Be Chairman of the EEOC, 99th Cong., 2d Sess. 44-46, 50 (July 23, 1986) (Testimony of Clarence Thomas).

<sup>162</sup> Affirmative Action Goals, *supra* note 78, at 402.

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representation of minorities should precisely mirror the percentage of minorities in the labor pool, (4) they deprive actual victims of compensation in the form of back pay and tend to benefit the least needy in the minority community, (5) they do not address current conditions in the job market, (6) they allow employers to shift the costs of the remedy from themselves to their inadequately-compensated victims and to other employees who bear the burden of reduced opportunities, and (7) they create enmity between the races and perpetuate the notion that minorities cannot compete without built-in preferences. The article did not discuss his views on the adequacy of relief in the common situation where the form of the employer's discrimination has made it impossible to identify the minorities or women who would have been selected in the absence of discrimination.

(b) His Views on the Inadequacy of Present Remedies

As an alternative to affirmative action, Judge Thomas has consistently called for the strengthening of remedies for violations of Title VII.<sup>163</sup> He argued that stronger civil rights penalties would avoid the problem of unfairness that he

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<sup>163</sup> See February 20, 1986 Speech by Clarence Thomas before the Georgetown Law Center EEO Symposium at the Hyatt Regency in Washington, D.C., p. 11 (referring to "the inherent weakness of Title VII"), EEOC Head, Rights of Individual No. 1, Washington Times, July 20, 1983, at 2 (claiming that Title VII "could really stand some more clout") [hereinafter "July 20, 1983 EEOC Head"]; EEOC Is Looking Closely at Affirmative Action Rules, Thomas Tells Women's Group, BNA Daily Labor Reporter, March 31, 1983, p. A-9. The Lawyers' Committee and other civil rights groups have also advocated strengthening remedies under Title VII.

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found inherent in race-conscious remedies.<sup>164</sup> Judge Thomas blamed the lack of appropriate civil rights penalties for the widespread acceptance of race-conscious programs:<sup>165</sup>

Today, the civil rights laws often appear to be without the teeth to ensure nondiscrimination. And, as a result, social engineering is substituted for a remedy that fits the wrong.

In Judge Thomas' view, a well-tailored remedy would penalize those who discriminate and would operate as a viable deterrent, ultimately removing the need for broad group-based remedies.<sup>166</sup>

Judge Thomas said that Title VII's equitable remedies are not as "compelling" as the civil remedies available under other statutes because they do not penalize employers who discriminate.<sup>167</sup> Judge Thomas repeatedly lamented that:

[T]here is something less than equitable about a system that subjects an individual to stronger sanctions for breaking into a mailbox than for violating the basic

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<sup>164</sup> See October 19, 1983 Speech by Clarence Thomas at the University of Virginia, p. 18. See also May 26, 1983 EEOC Chairman Thomas Reviews Role, *supra* note 138, at A-9.

<sup>165</sup> March 9, 1983 Speech by Clarence Thomas before the Equal Employment Opportunity Commission Seminar [hereinafter "March 9, 1983 EEOC Seminar Speech"]; See also May 20, 1983 Speech by Clarence Thomas before the State of Missouri Human Rights Conference, p. 17 (stating that "[w]ith this anemic history, it is no wonder there have been efforts to accomplish by fiat what could not be accomplished by the use of enforcement sanctions and disincentives for discrimination")

<sup>166</sup> See, e.g., July 11, 1983 Speech by Clarence Thomas before the International Association of Official Human Rights Agencies, in Philadelphia, Pa., pp. 20-21 [hereinafter "July 11, 1983 Human Rights Agencies Speech"]; see also Letter to the Editor from Clarence Thomas, Make Discrimination Expensive, USA Today, February 15, 1988.

<sup>167</sup> See, e.g., An Alternative to Quotas Must Be Located, Washington Times, August 6, 1984 (claiming that "[t]here should be a cost to discrimination"); July 20, 1983 EEOC Head, *supra* note 163, at 2.

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civil rights of another human being.<sup>168</sup>

Judge Thomas believed that the public does not perceive civil rights statutes as providing effective remedies for discrimination because they lack such penalty provisions. In a frequent comparison, Thomas states:

One significant difference between the antitrust laws and the civil rights laws is the magnitude of public acknowledgment that a violation will result in the imposition of a meaningful remedy.<sup>169</sup>

Lacking such penalties as the treble damages assessed against antitrust violators, the civil rights laws, Judge Thomas says, do not "command meaningful compliance".<sup>170</sup> For Judge Thomas, the obvious solution is to "change the law to permit greater penalties," such as the compensatory and punitive damages then allowed under California law.<sup>171</sup>

In his Yale article, Judge Thomas identified other ways to penalize discriminating employers including: allowing courts to impose heavy fines and jail sentences against discriminators who defy injunctions; handing over control of a discriminating employer's personnel operations to a special master; and seeking

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<sup>168</sup> July 11, 1983 Human Right Agencies Speech, supra note 166, at 20-21. See also Clarence Thomas, Discrimination and Its Effects, 21 Integrated Education 204, 205 (1983).

<sup>169</sup> March 9, 1983 EEOC Seminar Speech, supra note 165, at 14.

<sup>170</sup> April 27, 1983 Speech by Clarence Thomas to the American Newspaper Publishers Association, pp 5-6.

<sup>171</sup> Equal Employment Opportunity Commission Update. Policies on Pay Equity and Title VII Enforcement Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess 105-06 (June 21, 1985) (statement of EEOC Chairman Clarence Thomas), see also March 22, 1984 Speech by Clarence Thomas before the EEOC/706 Agency Conference, pp 2-3.

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specific recruitment and hiring practice changes.<sup>172</sup> However, anyone defying an injunction is obviously already exposed to severe sanctions by way of civil or criminal contempt. In addition, a court enforcing Title VII has always had the power to appoint a Special Master to oversee the affairs of a particularly recalcitrant defendant; this actually occurred in the Sheet Metal Workers case.<sup>173</sup> Specific recruitment and hiring practice changes are already common features of litigated and consent decrees.

This leaves penal sanctions for discussion. Some criminal penalties for civil rights violations already exist.<sup>174</sup> Some or all of Title VII could also be criminalized, although most blatant, intentional civil rights violations with identifiable victims could probably be prosecuted under existing law. In that regard, some State Fair Employment Practice Laws include criminal sanctions, but these have not been seen as very effective.

The bottom line with respect to Judge Thomas's alternatives for affirmative action is that they are not alternatives. They reach proven cases of intentional discrimination against identified victims, but much of what is considered to be discrimination today in this country under existing law cannot be proved under that standard or does not constitute that type of discrimi-

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<sup>172</sup> Affirmative Action Goals, *supra* note 78, at 408-11

<sup>173</sup> 478 U.S. at 432.

<sup>174</sup> *See* 18 U.S.C. §§ 241, 242, 243, 245, 246 and 247.

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nation, including most disparate-impact employment situations.

Judge Thomas answers that such discrimination is, at least, far less significant than it used to be. We believe he is incorrect; there is current evidence which establishes that such discrimination remains pervasive,<sup>175</sup> and numerous decisions in the 1980's and afterwards reflect its many occurrences.

If Judge Thomas is right --- if, for example, there are few significant discriminatory practices resulting in victims who cannot be identified --- then there will be little further need for affirmative action. When that happens, if it ever does, Judge Thomas's concerns about affirmative action will be substantially relieved.

There is much legitimate concern, and Judge Thomas expresses such concern, over what are appropriate affirmative action remedies in a particular case of proven discrimination, or in the settlement of discrimination claims, or in legislation providing for minority set-asides.<sup>176</sup> The tailoring of equitable relief in this area must truly be equitable, and that is an enormously difficult task. Judge Thomas's answer is to do away with the remedy entirely, and that strikes at the heart of established civil rights jurisprudence long recognized by the Congress, successive Administrations, and the courts.

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<sup>175</sup> See the Urban Institute studies discussed above at 23-24

<sup>176</sup> Drew S. Days III, Fullilove, 96 Yale Law Journal 453 (1987).

(c) His Policy Rationale for Disapproving  
Affirmative Action

In a 1987 profile of Judge Thomas in The Atlantic, Juan Williams related a story Judge Thomas had told him years before:<sup>177</sup>

He was on the back porch, playing blackjack for pennies with some other boys. As the game went on, one boy kept winning. Thomas finally saw how: the cards were marked. The game was stopped. There were angry words. Cards were thrown. From all sides fast fists snatched back lost money. There could be no equitable redistribution of the pot. The strongest, fastest hands, including those of the boy who had been cheating, got most of the pile of pennies. Some of the boys didn't get their money back. The cheater was threatened. The boys who snatched pennies that they had not lost were also threatened. But no one really wanted to fight -- they wanted to keep playing cards. So a different deck was brought out and shuffled, and the game resumed with a simple promise of no more cheating.

That story, Thomas said, is a lot like the story of race relations in America. Whites had an unfair advantage. But in 1964, with the passage of the Civil Rights Act, the government stopped the cheating. The question now is, Should the government return the ill-gotten gains to the losers -- the blacks, the Hispanics, and the women who were cheated by racism and sexism? Does fairness mean reaching back into the nation's past to undo the damage? . . .

Thomas believes that government simply cannot make amends, and therefore should not try. The best it can do is to deal a clean deck and let the game resume, enforcing the rules as they have now come to be understood. "There is no governmental solution," Thomas said. "It hasn't been used on any group. And I will ask those who proffer a governmental solution to show me which group in the history of this country was pulled up and put into the mainstream of the economy with governmental programs. The Irish weren't. The Jews weren't. Use what was used to get others into the economy. Show us the precedent for all this experimentation on our race."

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<sup>177</sup> 1987 Atlantic Profile, supra note 83, at 78-79.

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He returned to the idea of the cheater on the porch: "I would be lying to you if I said that I didn't want sometimes to be able to cheat in favor of those of us who were cheated. But you have to ask yourself whether, in doing that, you do violence to the safe harbor, and that is the Constitution, which says you are to protect an individual's rights no matter what. Once you say that we can violate somebody else's rights in order to make up for what happened to blacks or other races or other groups in history, then are you setting a precedent for having certain circumstances in which you can overlook another person's rights?"

When government does try to help, Judge Thomas believes, it fails to help those really in need. "[T]hose who are the best prepared are the beneficiaries of programs and policies which are, or should be, designed to help the least prepared."<sup>178</sup>

Judge Thomas has also voiced great distaste for policies that classify people into groups, even where this is necessary to address a pattern of discrimination. His conviction that this is inappropriate is so strongly felt that he is willing to abide by it even at the price of rendering the civil rights laws powerless to deal effectively with broad patterns of discrimination.<sup>179</sup>

If we permit taking race into account in classifying people, Judge Thomas argues, we undermine the only principled defense against racial discrimination.<sup>180</sup>

The NAACP, the Urban League and other civil rights organizations considered it a victory when we got the

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<sup>178</sup> June 7, 1982 Speech by Clarence Thomas to an EEOC Workshop sponsored by the Associated Industries of Alabama, p. 8

<sup>179</sup> See the discussion above at 29-30

<sup>180</sup> Interview in 1984 with Clarence Thomas, printed in *You Be the Judge*, The Capital Spotlight, July 25, 1991, at 1.

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Civil Rights Act of 1964, which pointedly said, don't consider [race and national origin]. Civil Rights organizations fought for the public not to consider race when one goes for a job.

. . . Once you start conceding that under certain circumstances, one can consider race, you are setting a precedent for the consideration of race in a lot of other instances. If it is okay to consider that I am black to get a job, why isn't okay to consider that I am white to get the same job?

Judge Thomas's many public statements do not adequately address the difficulty of providing any meaningful remedy for patterns of discrimination if affirmative action is not allowed, and if it is not possible to determine which particular black, Hispanic, Asian or female candidates would have been selected in the absence of discrimination. The problem is a very real one, and it arises frequently. If there is no meaningful remedy, even an intentional discriminator would have succeeded in its primary goal: keeping its workforce lily-white, or Anglo, or male, or as much so as possible. Such an employer does not limit itself to keeping a particular black, Hispanic, Asian or woman out; it wants to keep as many as possible out. A remedy which does not deprive the employer of such a goal is ineffective.

It is not an adequate answer to reject the promotion of potential victims because the precise victims are unknowable. If such rejections were to become the law, minorities and women would be left without the hope of a meaningful change in their workplace and would have correspondingly little incentive to file charges and litigate cases.

There is a substantial question whether Judge Thomas

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would vote to overturn the affirmative-action decisions the Court handed down from Weber to Johnson and Paradis, and thus to leave minorities and women without any effective remedy for past discrimination in those cases where individual victims cannot be precisely identified.

F. Judge Thomas's Positions on Fullilove v. Klutznick, and on Set-Asides of Government Contracts for Minority Contractors

Judge Thomas has denounced the Supreme Court's decision in Fullilove v. Klutznick,<sup>181</sup> which approved Federal legislation requiring that at least 10% of the Federal grants from the public works projects being funded be set aside for minority business enterprises. The legislation was passed as a Congressional effort to halt years of exclusion of minority contractors from the business opportunities created by such public-works projects. Congress had included the provision in the Public Works Employment Act of 1977 after receiving "abundant evidence" that minority businesses had been denied effective participation in public contracting opportunities "by procurement practices that perpetuated the affects of prior discrimination."<sup>182</sup>

While individual Justices in the majority disagreed about the standard to be used in reviewing race-conscious remedies, all agreed that the program satisfied whatever level of scrutiny they applied, as it was "equitable" and "reasonably

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<sup>181</sup> 448 U.S. 448 (1980).

<sup>182</sup> 448 U.S. at 477-78 (opinion of Burger, C.J.).

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necessary to the redress of identified discrimination."<sup>183</sup>

Judge Thomas denounced the Court's decision in Fullilove for accepting the idea the Congress has "virtually unlimited power."<sup>184</sup> In fact, each of the opinions of the Court stated an explicit and far from unlimited standard for review of congressional racial classifications.

Judge Thomas's criticism of the Court's decision in Fullilove is tame compared to his criticism of the Congress which enacted the provision at issue. Judge Thomas wrote:

Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside law the Court upheld in Fullilove v. Klutznick? What the two branches were saying is this. . . . Congress can devise laws justifying racial and ethnic set-asides on the basis of its powers to regulate interstate commerce. Any "equal protection" component of the Fifth Amendment due process clause is irrelevant. . . .<sup>185</sup>

In fact, in enacting the remedial provision to assure minority business enterprises a portion of public works contracts, the Congress was relying on "an amalgam of its specifically delegated powers":<sup>186</sup> specifically the spending power, whose reach, Chief Justice Burger said, is as broad as the Commerce Clause,<sup>187</sup> and

<sup>183</sup> 448 U.S. at 510, 516 (Powell, J., concurring)

<sup>184</sup> Civil Rights as a Principle, *supra* note 9, at 399

<sup>185</sup> *Id.* at 396 In a 1988 speech, Judge Thomas appeared to express a general denunciation of Congress' role in the arena of civil rights. See April 18, 1988 Tocqueville Forum Speech, *supra* note 40, at 20 (Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom")

<sup>186</sup> 448 U.S. at 473 (opinion of Burger, C.J.)

<sup>187</sup> 448 U.S. at 475

## LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Congress' enforcement power under Section 5 of the Fourteenth Amendment.

Conclusion

Because Judge Thomas is a nominee for a lifetime position on the highest court in the land, his stated views must not only withstand rational scrutiny, but must demonstrate that he has the ability to work within the framework of over two hundred years of established Supreme Court precedent to address the difficult issues that are sure to arise.

Judge Thomas has criticized most of the judicial and statutory building blocks for the protection of civil rights in this country --- not only admittedly controversial and difficult court decisions and governmental policies, but also those widely accepted as fundamental to the protection of civil rights for every American. Judge Thomas has also attacked the Court and the Congress for their role in laying down those building blocks, arguing instead for a "limited government" that would leave Americans with rights but uncertain remedies --- or no remedies at all --- for violations of those rights.

Moreover, Judge Thomas has presented a novel and ill-considered constitutional theory as an alternative to the jurisprudence of the Supreme Court since Brown v. Board of Education. The potential consequences of this theory for Supreme Court jurisprudence in a wide array of constitutional issues are enormous. There is no sign in Judge Thomas's statements and writings that he has thought through the implications of his

## LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

theories.

Judge Thomas's abrupt and unexplained changes of position on the breadth of discrimination in this country, on the Griggs rule, on the Uniform Guidelines for Employee Selection Procedures, on the use of statistical evidence in proving discrimination, on the remedies for discrimination in the common situation in which the form of the employer's discrimination has made it impossible to prove which particular minorities or women would have been selected in the absence of discrimination, and in the propriety of goals and timetables as devices for measuring an employer's compliance with the law, do not demonstrate the reflection before reaching important conclusions which is essential in a Justice of the Supreme Court.

We urge the Senate not to confirm this nomination.



LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW

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September 30, 1991

Ms. Anne Rung  
Senate Judiciary Committee  
Room 224 Dirksen Senate Bldg.  
Washington, D.C. 20510

Dear Ms. Rung:

Attached is the corrected version of the Lawyers' Committee for Civil Rights Under Law's letter to Senator Joseph Biden dated September 20, 1991 requesting inclusion of William H. Brown's testimony and other documents. Please substitute the attached letter for the one you previously received.

Sincerely,

A handwritten signature in cursive script, appearing to read "Barbara R. Arnwine".

Barbara R. Arnwine  
Executive Director

BRA:vpj  
Attachment

cc: William H. Brown, III  
Herbert M. Wachtell  
Dean Erwin Griswold  
The Executive Committee  
The Ad Hoc Committee on  
the Thomas Nomination



LAWYERS' COMMITTEE  
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September 20, 1991

VIA MESSENGER

Honorable Joseph R. Biden  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510-6275

Re: Formal Request for the Inclusion of the Testimony of the Lawyers' Committee for Civil Rights Under Law and Related Documents in the Record of the Confirmation Hearings of Judge Clarence Thomas

Dear Senator Biden:

On September 10, 1991, we transmitted to the Senate Judiciary Committee, by letter to you, a statement in opposition to the confirmation of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court. We included with that statement the names of individual members of the Board of Trustees and others affiliated with local Lawyers' Committees who endorsed the statement. We also included a concurring statement and three statements of dissent. Moreover, we included a lengthy Memorandum on the nomination of Judge Clarence Thomas, discussing, in detail, the reasons that the Lawyers' Committee opposed the confirmation of Judge Thomas.

On September 17, 1991, Dean Erwin Griswold and myself testified before the Senate Judiciary Committee on behalf of the the Lawyers' Committee. In light of the number of groups which requested an opportunity to testify, we greatly appreciated being given the occasion to appear before the Senate Judiciary Committee. At the time of our testimony, we submitted written copies of our testimony to members of the Senate Judiciary Committee and to the recording secretary who was present at the Hearings.

## LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

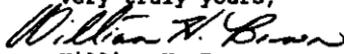
Honorable Joseph R. Biden  
September 20, 1991  
Page 2

Although we have already submitted our written testimony and other related documents to all of the members of the Senate Judiciary Committee, we formally request that these documents be included in the record of the Hearings on the Confirmation of Judge Clarence Thomas. Furthermore, we would like to update the list of names appended to the statement in opposition to the confirmation of Judge Clarence Thomas and the dissent. As is reflected on our updated list, ninety members of our Board of Trustees have signed the statement of opposition in their individual capacity and seventy-eight lawyers affiliated with local Lawyers' Committee have joined in expressing their opposition. One additional member has joined the dissent, for a total of eight dissenters.

To facilitate the inclusion of these documents in the record, we enclose three complete sets of the documents which the Lawyers' Committee requests be entered into the record of Confirmation Hearings of Judge Clarence Thomas. If possible, we would appreciate it if these documents are included in the record of the afternoon session of September 17, 1991, following or near the recordation of our testimony.

Once again, we appreciate being given the opportunity to testify before the Senate Judiciary Committee. We would also like to express our appreciation for the efforts made by all of the members of staff, including Mr. Jeff Peck, in facilitating our participation in this process.

Very truly yours,



William H. Brown  
Co-Chair

Enclosures

cc: Honorable Strom Thurmond  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate

The CHAIRMAN. Thank you, Mr. Brown.  
Dean Griswold, welcome.

#### STATEMENT OF ERWIN N. GRISWOLD

Mr. GRISWOLD. Thank you, Senator. Obviously, I can only summarize. It seems to me, however, that the present hearings have left open several basic and important issues. No one questions that Judge Thomas is a fine man and deserves much credit for his achievements over the past 43 years. But that does not support the conclusion that he has as yet demonstrated the distinction, the depth of experience, the broad legal ability which the American people have the right to expect from persons chosen for our highest court.

Compare his experience and demonstrated abilities with those of Charles Evans Hughes or Harlan Fiske Stone, with Robert H. Jackson or the second John M. Harlan, with Thurgood Marshall or Lewis H. Powell, for example. To say that Judge Thomas now has such qualifications is obviously unwarranted.

If he should continue to serve on the court of appeals for 8 or 10 years, he may well show such qualities, and I hope he does. But he clearly has not done so yet.

I have no doubt that there are a number of persons—white, African-American, or Hispanic, male or female—who have demonstrated such distinction. I do not question that the President has the right to take ideological factors into consideration, and it seems equally clear to me that this committee and the Senate have a similar right and power. But that is no reason for this committee or the Senate approving a Presidential nominee who has not yet demonstrated any clear intellectual or professional distinction.

And the downside—and this worries me profoundly—is frightening. The nominee, if confirmed, may well serve for 40 years. That would be until the year 2030. There does not seem to me to be any justification for taking such an awesome risk.

Judge Thomas' present lack of depth seems to me to be demonstrated by his contact with the concept of natural law. He has made several references to natural law in his speeches and writings, though it is quite impossible to find in these any consistent understanding of that concept. This is very disturbing to me because loose use of the idea of natural law can serve as support for almost any desired conclusion, thus making it fairly easy to brush aside any enacted law on the authority of a higher law what Holmes called a brooding omnipresence in the sky.

That is bad enough, but the nominee has now said to this committee that he does not think that natural law plays any role in constitutional decisions. And this is frightening, indeed, for it is quite clear in the 200 years of this country under the Constitution that natural law concepts do have an appropriate role, sometimes in modern times called moral concepts, law and morals, not in superseding the Constitution but in construing it.

There are a number of excellent articles in this difficult field. The great Princeton scholar, Corwin, wrote on the higher law background of American constitutional law. Professor Fuller wrote a book on the morality of law. The philosopher, not a lawyer, Raul,

wrote a book on a theory of justice. And, finally, I would refer to Alexander Bickel's book on the morality of consent.

As an example of what I have in mind, I might refer to the *Dred Scott* case. It was one where the Court did not make adequate use of natural justice. If it had done so, recognizing that Scott had become a citizen when he was taken to free territory, it might have averted the Civil War.

A more current example is privacy. It is not mentioned in the Constitution, but the Supreme Court has rightly found it there by interpreting several of the Constitution's clauses together in the light of deep-seated natural justice concepts, including the Court's conclusion and understanding that this is implicit in the basic concept of the Founding Fathers when they drafted the Constitution.

We also find natural law, natural justice concepts in such areas as cruel and unusual punishment, in rights of conscience where I would refer to the case of *Welsh v. United States* involving a conscientious objector during the Vietnam war who expressly disclaimed any religious basis for his objection. He simply said that it was against his conscience and he would not serve, and the Supreme Court held that that came within the proper construction of the statutes which Congress had enacted for conscientious objection.

Finally, I would turn to the whole area of process, including the application of statutes enacted by Congress providing for affirmative action. We have, for example, the one-man, one-vote cases which have a large element of natural justice in them.

We have cases going back more than a century rejecting discrimination on the ground of race, *Griswold v. Hopkins* in 1886. We have more recently the case of *Moore v. City of East Cleveland*, the place where I was born, where the Court held that a city ordinance forbidding families to live together unless they were parent and child, and this had a grandparent and two grandchildren who were not brothers and sisters, but were cousins, and the Court held that the city ordinance was invalid, essentially on natural justice concepts. We have *Gideon v. Wainwright*, the appointment of counsel, which has a large element of natural justice.

Now, with respect to affirmative action, we have, of course, a terrible history in this country. For more than 200 years, the white settlers here grievously victimized persons of African descent, whose descendants today are African-American citizens. Not only were they held in slavery, but they were denied education and all cultural advantages.

It took a Civil War to end this massively unjust regime. But then we had the period of share croppers and lynching and Jim Crow. Though the slaves were free, their opportunities were severely restricted by force of law. It was not until the middle of this century that we began to move ahead, and under the leadership of Lyndon B. Johnson, the Congress enacted a number of constructive statutes designed to provide a greater equality of opportunity.

We should not forget that the 13th, 14th, and 15th amendments were adopted as a result of the Civil War. They were essentially focused on African-Americans. They were designed to pull African-Americans up to a position of equality. Everyone was protected by the due process clause, but the African-Americans needed it

most. The same was true of the equal protection clause. As Justice Blackmun has so well said in his opinion in the *Bakke* case:

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot, we dare not, let the Equal Protection Clause perpetuate racial supremacy.

Anyone who has lived through the past 50 years can see that we have made some progress. When I was a young man in the Department of Justice, now 60 years ago, it would have been inconceivable that the President would nominate a black man to the Supreme Court, or that the Senate would give serious consideration in such a case. There were then no black lawyers in the Department of Justice, no black FBI agents.

We have made progress, but not enough. I hate to think that the progress we have made will come to a halt by a literalistic interpretation of the Civil War amendments, thus frustrating the accomplishment of what they were clearly intended to do.

In conclusion, I would only say that, having followed these hearings through the newspapers, but very closely, it seems to me that there are many significant issues as to which no information has been given.

What is the nominee's approach to other important questions which frequently come before the Court, the whole area, for instance, of separation of powers, of the allocation of function between the President and the Congress and the judiciary?

What about the problems of preemption, which occupy perhaps 10 or 15 percent of the Court's cases, the question of when an act of Congress can supersede a statute enacted by a State?

Finally, I would refer to the area of intergovernmental immunities, relations between State and the Federal Government. I join with Mr. Brown on behalf of the Lawyers Committee on Civil Rights Under Law, of which I have been a member by invitation of President Kennedy since 1963, in hoping that the Senate will not confirm this nomination.

Thank you.

[The statement of Mr. Griswold follows:]

NOTES FOR APPEARANCE OF ERWIN N. GRISWOLD  
BEFORE THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE  
-- TUESDAY, SEPTEMBER 17, 1991

In the time available to me, I can only summarize. I will first say, though, that the present hearings seem to me to leave open several basic and important issues.

I. Qualifications

No one questions that Judge Thomas is a fine man, and deserves much credit for his achievements over the past forty-three years. But that does not support the conclusion that he has as yet demonstrated the distinction -- the depth of experience, the broad legal ability -- which the American people have the right to expect from persons chosen for our highest judicial tribunal. Compare his experience and demonstrated abilities with Charles Evans Hughes or Harlan Fiske Stone, with Robert H. Jackson or the second John M. Harlan, with Thurgood Marshall and Lewis H. Powell, for example. To say that Judge Thomas has such qualifications is obviously unwarranted. If he should continue to serve on the court of appeals for eight or ten

years, he may show such qualities, but he clearly has not done so yet.

I have no doubt that there are a number of persons, male or female, African American or white or Hispanic, who have demonstrated such distinction. I do not question that the President has the right to take ideological factors into consideration, and it seems equally clear to me that this Committee and the Senate have a similar right and power. But that is no reason for this Committee, or the Senate, approving a presidential nominee who has not yet demonstrated any clear intellectual or professional distinction. And the down side is frightening. The nominee, if confirmed, may well serve for forty years. That is until the year 2030. There does not seem to me to be any justification for taking such an awesome risk.

## II. Natural Law

Judge Thomas' present lack of depth seems to me to be demonstrated by his contact with the concept of "natural law." He has made various references to "natural law" in his speeches

and writing, though it is quite impossible to find in these any consistent understanding of that concept. This is very disturbing to me because loose use of the idea of natural law can serve as support for almost any desired conclusion, thus making it fairly easy to brush aside any enacted law on the authority of a higher law -- what Holmes called a "brooding omnipresence in the sky."

That is bad enough, but the nominee has now said to this Committee that he does not think that "natural law" plays any role in constitutional decisions. This is frightening indeed -- for it is quite clear in the two hundred years of this country under the Constitution that "natural law" or "higher law" concepts do have an appropriate role -- not in superseding the Constitution but in construing it.

Corwin, "The Higher Law Background of American Constitutional Law," 42 Harv. L. Rev. 149 (1928), 365 (1929)

Fuller, "The Morality of Law" (1964)

Rawls, "A Theory of Justice" (1971)

Bickel, "The Morality of Consent" (1975)

The Dred Scott case, for example, was one where the Court did not make adequate use of "natural justice." If it had done so, recognizing that Scott had become a citizen when he was taken to free territory, it might have averted the Civil War.

A more current example is Privacy. It is not mentioned in the Constitution, but the Supreme Court has rightly found it there by interpreting several of the Constitution's clauses together, in the light of deep-seated "natural justice" concepts, including the Court's conclusion and understanding that this is implicit in the basic concept of the founding fathers when they drafted the Constitution.

Cruel and Unusual Punishment

Weems v. United States, 217 U.S. 349 (1910)

Robinson v. California, 370 U.S. 660 (1962) -- The crime of being "addicted to the use of narcotics."

*Solem v. Helm*, 463 U.S. 277 (1983)

Rights of Conscience

*Welsh v. United States*, 398 U.S. 333 (1970) -- not a religion case. The petitioner asserted his beliefs were not religious.

III. Due Process

Voting

*Reynolds v. Sims*, 377 U.S. 533 (1964) - one man, one vote case

Denial of education to children of illegal aliens

*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

*Moore v. City of East Cleveland*, 431 U.S. 494 (1977), quoting Harlan, J.: Respect for the teachings of history [and] solid recognition of the basic values that underlie our society.

Appointment of Counsel

*Gideon v. Wainwright*, 372 U.S. 355 (1963)

Affirmative Action

For more than two hundred years, the white settlers in this new country grievously victimized persons of African descent, whose descendants today are our African American citizens. Not only were they held in slavery, but they were denied education and all cultural advantages.

It took a Civil War to end this massively unjust regime. But then we had the period of share croppers, and lynching, and Jim Crow. Though the slaves were free, their opportunities were severely restricted by force of law. It was not until the middle of this century that we began to move ahead, and, under the leadership of Lyndon B. Johnson, the Congress enacted a number of constructive statutes designed to provide greater equality of opportunity.

We should not forget that the Thirteenth, Fourteenth and Fifteenth Amendments were adopted as a result of the Civil War. They were essentially focused on African Americans. They were designed to pull the African Americans up to a position of

equality. Every one was protected by the Due Process Clause, but the African Americans needed it most. The same was true of the Equal Protection Clause. As Justice Blackmun has so well said in this opinion in the Bakke case (Regents of the University of California v. Bakke, 437 U.S. 265, 407 (1978):

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetrate racial supremacy.

Frankfurter, J., in *Railway Mail Association v. Corsi*, 326 U.S. 88, 97 (1945)

A State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that amendment.

Any one who has lived through the past fifty years can see that we have made some progress. When I was a young man in the Department of Justice, now sixty years ago, it would have been

inconceivable that the President would nominate a black man to the Supreme Court, or that the Senate would give serious consideration in such a case. There were then no black lawyers in the Department of Justice, no black F.B.I. Agents.

We have made progress, but not enough. I hate to think that the progress we have made will come to a halt by a literalistic interpretation of the Civil War Amendments, thus frustrating the accomplishment of what they were clearly intended to do.

#### IV. Other Questions

What is the nominee's approach to other important questions which frequently come before the Court?

Separation of Powers

Preemption -- When does a federal statute over-ride state law?

Intergovernmental immunities

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

have a right to articulate those views, his own positions. His positions, I think, are shared by quite a number of people. There may be a number of ways of achieving a certain objective.

But when it comes to the question of looking at someone for the Supreme Court of the United States, you, like ourselves, have a limited amount of things to look at. You look at what he has done before; you look at his prior record, obviously; you look at what he has done in the Federal branches of Government; and you look at what he has done since he has been a judge on the appellate court.

It seems to me when you look at these particular areas, Judge Thomas has not exhibited, in my opinion and in the opinion of the 90 members of the board of trustees of the Lawyers Committee, the kind of concern that would justify the Senate committee approving him to be on the Supreme Court. When we look at the different positions he has taken—and I am not here to criticize anyone changing their positions, because it seems to me all of us, given the nature of the human being, can, and at appropriate times, make changes in our own positions.

But the changes which have come about on the part of Judge Thomas have been fairly recent changes, and I think in that context we have to look at what are the reasons for those changes. To whom were those changes communicated? And don't we have a reasonable expectation that in the event that someone does articulate what his positions are on these very critical issues, that those positions will continue to be his positions at the point in time when he goes on the bench. So—

The CHAIRMAN. I just want to make it—I am sorry. I didn't mean to cut you off.

Mr. BROWN. Go ahead.

The CHAIRMAN. I just want to make it clear that the reason for my questions to you as the spokesperson for the Lawyers Committee is that this is a Lawyers Committee on Civil Rights.

Mr. BROWN. That is right.

The CHAIRMAN. This is not a Lawyers Committee on all subjects, although you are all completely competent to speak on a broad range of subjects. I can't think of any that Dean Griswold was not competent to speak on, and I expect you are in the same situation.

But I want to make it clear the reason for the questions relate to the essence of the view that you are attempting to communicate to us from the Lawyers Committee, which is that an overwhelming majority of the Lawyers Committee on Civil Rights believe that Judge Thomas is not qualified to be on the Court. I assume it stems from at least his view on civil rights, among other things. Is that correct?

Mr. BROWN. That is correct.

The CHAIRMAN. I yield to the Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

I want to thank all of the witnesses on this panel for coming and appearing here today and testifying. Dean, I am glad to see you again.

I have no questions.

The CHAIRMAN. Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

Dean Griswold, the committee is honored that you would join us today. I can't help but noting that you had presented arguments on cases before the U.S. Supreme Court some 5 years before William O. Douglas was nominated to that Court, if my mathematics is correct.

I would be interested in your observations about Justice Douglas and his young, relatively young age at being elevated on to the Court. Obviously Judge Thomas is relatively young or quite young compared to other judges when they have been nominated.

Was the youth of Justice Douglas a major impediment to his functioning on the Court? What was your observation about his early service?

Mr. GRISWOLD. Well, Senator, that is a long—a question that involves reviewing a long period of time and is very complicated.

Douglas was a man of great intellectual brilliance, which I don't think the present nominee has shown so far. He had great energy, great imagination, and his first 10, 15 years he was a great Justice.

After that, he in my judgment went steadily downhill. He got bored with the Court's work. He dashed it off. And the final 10 years, at least, of his membership on the Court was not, in my view, distinguished. And I have heard the same reaction expressed by other people.

In the case of Douglas, you are starting out with a really great mind. I don't see any signs of corresponding scholarly intellectual ability in the present nominee. As I have said, if he had 8 or 10 years on the court of appeals he might show it. But to me it is quite clear that he has not shown any qualifications comparable to those of Justice Douglas at the time he was appointed.

Senator BROWN. Mr. Brown, your committee has been kind enough to come and share their views today with us. Was the decision of your committee a unanimous one?

Mr. BROWN. No, Senator. As I have indicated, we have 90 members of the committee who support the position. There were 8 individuals who either filed their own position in dissent or had joined with others. So there were 8 who did not ascribe to the position of the 90 of those who did.

We also had some 20 members who abstained for various reasons, some of which would have presented conflicts of interest for them.

Senator BROWN. If you are comfortable, would you be willing to summarize for us the comments or the concerns or those who dissented?

Mr. BROWN. I think, as best I recall the primary reasons for their dissent, some felt that we should delay taking any position until after the conclusion of the testimony of Judge Thomas. Some felt that he did, in fact, possess the necessary qualifications to be considered and approved for service on the Supreme Court.

Senator BROWN. Well, I am sure we all appreciate both of you coming, and we appreciate your taking the time to counsel the committee. Thank you.

The CHAIRMAN. I have one question. Senator Kennedy wanted very much to be back to ask this question of the panel, and he asked if I would ask it on his behalf.

That is, gentlemen, what do you anticipate the impact on the past 25 years of progress on civil rights would be if Judge Thomas' views, as you believe them to be, prevail on the Supreme Court?

Mr. GRISWOLD. Judge Thomas alone is very important on that question. But we already have on the Court a number of far more conservative Justices than we have seen for many years. And the real substance of the question is what would be the impact of the last four appointments. I think in my view it will be disastrous. I think it will stop in its tracks the slow but steady progress we have been making.

Let me just add, Senator, that I think my interest in civil rights goes back to the time when I was in the fourth grade in the public schools in East Cleveland, OH. And for the first time, I had in my hand a copy of the Constitution. I was about 10 years old. And I read it. And I raised with the teacher problems about voting in the South.

The teacher said to me—and I pointed to the 15th amendment. The teacher said to me, well, that is a part of the Constitution that is not enforced. And I remember that just burned me up at age 10. Here is the Constitution. This is us. This is our Government. But there is the part that isn't enforced. As I look back, I think that then and there I decided I was going to try to do what I could to try to see to it that the Constitution is enforced, including the 13th, 14th, and 15th amendments, and that we have real due process of law and real equal protection of the laws.

Nothing really much happened until the early 1950's, but since then many things have happened. Many of the current generation are not aware of how much things have improved, but they have improved. But the task is by no means done, and I feel that that is one of the important issues before this committee and the Senate now, whether we shall erect another obstacle toward the eventual achievement of true equal protection of the laws of all persons in this country.

Mr. BROWN. Senator, I can only add to that, if in fact Judge Thomas' articulated positions on these issues had been followed, many of the major advancements in the area of civil rights would not have occurred. There is no doubt about that in my mind. I guess the best example we can give is of the AT&T litigation which we were involved in at the Equal Employment Opportunity Commission.

If we had indeed had to prove individual cases, we would be even today still trying to resolve many of those issues. We found that some 7 percent of the individual charges pending before the Commission involved some of the same issues. And we were able on an across-the-board basis to eliminate discrimination and the systems which have given rise to many discriminatory conducts. I think that is critically important.

I also think that if we were to follow Judge Thomas' current positions, if we look at his record at the Office of Civil Rights and at the EEOC, the idea of not completely enforcing all the laws that the agency which you are heading would have a devastating effect on this country.

I think that laws which are either flagrantly broken or laws which are poorly enforced strike at the very heart of our society.

And while we all agree there have been significant advancements, I could not agree more with Dean Griswold that but for those advancements, through the Supreme Court in most cases, this country would not be the country that it is. And I think we would be a long, long way away from what we consider to be the real objective, and that is the attainment of civil rights for all groups, both minorities and for women.

The CHAIRMAN. Well, I thank you both very much. I know you did not take this decision lightly, nor did the Lawyers Committee take it lightly. I appreciate your concern and your willingness to come forward. The committee thanks you, and I apologize that we kept you all waiting so long.

Mr. BROWN. That is quite all right. Thank you, Senator.

The CHAIRMAN. Thanks again.

Our next witness is a very distinguished American: Dean Calabresi, the current dean of Yale Law School, who has come to testify. He was going to be on a panel. Come forward, Dean. Welcome. He was going to testify with the president of Lincoln University whom we put on an earlier panel. So, Dean, the table is yours alone.

Thank you very, very much for taking the time to come. You have come to testify on behalf of Judge Thomas and we are anxious to hear what you have to say.

#### STATEMENT OF GUIDO CALABRESI, DEAN, YALE LAW SCHOOL

Mr. CALABRESI. Senator Biden, Senator Thurmond, over the years, I have had the honor and pleasure of teaching various Members of this body, ranging from former Senator Gary Hart, to Senator Joseph Lieberman, to Senator John C. Danforth.

I did not teach Judge Clarence Thomas, but because some of his closest friends in law school were students of mine and were people to whom I was especially devoted, I came to know him well when he was at Yale.

He was at the time an admirable person who demonstrated a capacity for independent thought that is always unusual, but is especially so among students, for they tend all too frequently to conform to the current mood. His approach to law when he was a student was not especially linked with the left or with the right. What characterized him was that he could not be predicted, that he was always seeking more information in order to decide what made sense to him, and that whatever position he took was his own and was powerfully and eloquently held. Because of this, I recommended him to Senator Danforth, who was looking for an able youngster who could think for himself. I was glad I did so then, and I am glad I did so now.

Many of his views have changed, several times, since those days. That does not surprise me. It is almost inevitable with people who are truly struggling with ideas and wrestling with the great issues of the day. I would expect that at least some of his views may change again. I would be less than candid, if I did not tell you that I sincerely hope so, for I disagree with many, perhaps most of the public positions which Judge Thomas has taken in the past few years.

But his history of struggle and his past openness to argument, together with his capacity to make up his own mind, make him a much more likely candidate for growth than others who have recently been appointed to the Supreme Court and who, whatever they may have said at their confirmation hearings, had in fact been set in their ways and immovable back to their lack school days.

Such a capacity for growth, as a Justice develops his or her own constitutional philosophy, is essential if a person is to become a truly great Justice. None of the great Justices of the past, not Justice Black, nor Justices Harlan or Stewart, not Justice Holmes nor Justices Brandeis or Cardozo, not even Justice Frankfurter, for all his years of teaching constitutional law, came to the Court fully formed.

The Court itself, and the individual cases that came before them, shaped them, even as they shaped the Court. In the end, it was a combination of character, ability, willingness to work really hard, and openness to new views that made them great Justices. These qualities, if there truly is openness, matter far more than past positions. Many a Justice has changed his mind dramatically since going on the Court. I hope and believe that Judge Thomas has these qualities, and that is why I am here today.

I would like to close with one anecdote about Judge Thomas as a student. Judge Thomas had a fine law school record. But early on he did get a poor grade, though clearly passing grade, from one of the toughest teachers in the school. When that happens, most students stay as far away from such a professor as they possibly can. Not Judge Thomas. He not only went back to the same teacher for another course, but chose to do his senior essay, his dissertation, for that teacher, and this time he received an honors, the highest grade given in the school. The quality this demonstrates has stood Judge Thomas well in the past. It will stand him well in the future.

Thank you.

The CHAIRMAN. I want to note, Dean, that you are being watched. Look to your right, and eagle-eye Danforth, your former student, is over there. I just did not want—

Mr. CALABRESI. He was a good student.

The CHAIRMAN. He is a good Senator, as well.

I do not have any questions for you, because you have stated your views very bluntly, and you have said it and you have summed it up.

Quite frankly, although some of us have not fully decided how we are going to vote, we have to vote, as you well know, and I think all of us share what I would only characterize as an aspiration you have, and that is that his character and tenacity and willingness to work hard, coupled with his basic sound intellect, will overcome what seem to be some preposterous notions he has asserted in the past. That is my words, not yours. I used the word "preposterous."

Believe me, Dean, whether or not I vote for Judge Thomas, I pray you are correct, because I, like you, disagree with a number of his previously asserted positions. But I, like you, also believe that, for a 43-year-old man, with his limited experience, not in life, not in dealing with the problems of life, but limited experience in law,

and it is limited, notwithstanding the fact he is on the Bench, the notion that he would have a fully informed view of constitutional law would be premature.

I hope, at a minimum, that preparing for this process has informed Judge Thomas as to what he does and does not know, and also has done what it does for anyone who goes through the process of having to represent one of the three branches of Government, the President, a Member of Congress or the Court. We all have our elections, if you will, and we hope that they are designed not only for us to let our views be known to the people, but let the people's views be known to us. I have never known a candidate who was not more informed when the process was over than before he or she ran. I have never known a President, and I have known five now, who did not have a clearer notion of the needs of the country after having campaigned in every nook and cranny of the country, than before he campaigned.

I am hopeful that that process works as well in this situation because this is the equivalent of a campaign for a Supreme Court Justice, in my view, as it should be. I can see one of your former graduates coming in. If you want to respond to that, I will yield.

Mr. CALABRESI. I just want to say that this is an extraordinary time in the history of the Court. It has been 24 years since a Democratic President has nominated a Justice to the Supreme Court.

The CHAIRMAN. That has not been lost on some of us.

Mr. CALABRESI. And that is as long a time, perhaps as there has ever been in the history of this country, certainly since the Civil War, from 1860 to 1884 was a period of equivalent time.

At other times when there has been such an extended period of time, the President has attempted to name people to the Court whose views are very different from his own. Presidents Roosevelt and Truman, for what seemed an eternity but was only 20 years, named all the Justices and made a point of naming some Justices who were very conservative and some from the other party. Justice Reid and Justice Burn were Democrats and very conservative; Justice Burton was a Republican.

The CHAIRMAN. I doubt whether we are ever going to see that enlightenment in this administration.

Mr. CALABRESI. This administration and the past administration have not done so. Under these circumstances, they have continued to name people whom they thought would share their views, and that is their right in the first instance. But under those circumstances, I think that we have to hope that the people they have named at least have the capacity for growth, which some of the previous people who were nominated and who had, in my judgment, a less distinguished—Dean Griswold was quite candid in saying that some at least were with no more distinguished a record than Judge Thomas—but those people did not have a capacity for growth which Judge Thomas has.

I hope that in the future the administration will be more open to other views, but in the meantime, I think we are bound to hold people to the standard you have held in the past, especially when this is a nominee who has some capacity for growth which I did not discern in some of the earlier ones.

The CHAIRMAN. Well, I respect you very much, Dean, as thousands and thousands of lawyers across the country do, and I mean that sincerely. Of all the testimony that has been received, yours is the most persuasive to me, in the sense that if I do not factor in what you are talking about, I quite frankly find it hard to find a sufficient rationale to support Judge Thomas, because, as has been pointed out by you, other Presidents in similar periods have understood the wisdom of having the third branch reflect a diversity of view on the great issues of the day. I do not see that occurring and, as you know, as a student of history, and the one thing I can say—it sounds self-serving, but I have become a student of the history of the Court—

Mr. CALABRESI. You have indeed.

The CHAIRMAN [continuing]. After having to do so many of these, and have spent a great deal of time with your colleagues and professors of the law and legal scholars. I know for certain that in all those instances where the Presidents have attempted to remake the Court in their own image, they are the instances and essentially only the instances in which the U.S. Senate has said all right, if that is the way you are playing the game, then we must play it the same way.

I yearn for the day, especially if I remain chairman of this committee, I yearn for the day when the President, Democrat or Republican, picks a nominee simply based upon his or her overall instinct about what the nominee's intellectual capacity is, and not on what his or her views are.

I trust President Bush. I believe he is an honest man. But I doubt whether there is a single American out there who believes that President Bush said:

By the way, just go find me a nominee who has an open mind, just find me a nominee who has integrity, just find me a nominee who is schooled in the law, I ask no more.

John Sununu would have had an apoplexy, if that were the call. I just cannot fathom that having happened.

Mr. CALABRESI. I cannot imagine that happened, either, Senator. On the other hand, it would be ironical, if the test were the one which you are now proposing, and that were applied for the first time to someone who has more promise of growth, who at least has experienced life in a way that the previous nominees had not, who knows these things and who, insofar as he is showing these views of the administration, is in that particular also at odds with many of the friends that he made all through his growing up, that is, that the person who is doing this has shown more independence, although an independence in a direction that I do not share. So, it would be quite ironical to find that person being turned down for this, when the others just got through with all sorts of people, even people who are opposing this one, clapping their hands.

The CHAIRMAN. Although I have more time, I do not wish to take more time now, but at some point after this is over, I would really enjoy having an opportunity to sit down with you and discuss this, not Judge Thomas, but this whole process. Because, as you know, this is a cumulative process.

Mr. CALABRESI. It is indeed.

The CHAIRMAN. If this were the first time a person was put on the Bench, if he or she is the first ideologue of a Republican President leaning to the right, I think that is fine. I say fine, there should be people on the Bench who share that view, even if it is further right than I would agree to.

The second one, I say it is less fine. When it gets to the point where it looks like the attempt for the entire Court, all nine members to be that, then the standard will and, I will argue, intellectually must change, must change, not will, but must. One is fine, two is okay, three is okay. Four, five, six, seven, eight nine—it gets to the point where you are talking about 40 years of Supreme Court Justices, and that does make us all think. And I am sure, because you are a man of great intellectual honesty and integrity, you are sitting there saying I hope to God I am right about this guy.

Mr. CALABRESI. Of course I am.

The CHAIRMAN. We share the same concern. I wasn't being solicitous. Yours, to me, because of where I am on this nominee, is probably the most compelling testimony that I have heard in the entire—

Mr. CALABRESI. It may come to the point, Senator, that it came with President Hoover when, I am told, that Senator Borah went to President Hoover and said, "There is one person whom this committee will confirm, and that is Benjamin Cardozo." It may come to the point where the committee will have to take a leadership role in suggesting names rather than simply listening if the administration does not do its part. But that is different from what one can do when a name has been sent.

The CHAIRMAN. I agree, and we may be approaching that point. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Calabresi, I want to welcome you here. Wasn't there a Governor of Ohio by the name of Celebrezze?

Mr. CALABRESI. He spelled his name differently and was not related to me. His name was—

Senator THURMOND. He wasn't related to you?

Mr. CALABRESI. No. He arrived in the United States, or his family did, long before I did. I arrived 52 years ago yesterday.

Senator THURMOND. It is almost the same name, isn't it?

Mr. CALABRESI. Almost the same name. Almost the same.

Senator THURMOND. I think he was a Cabinet member down here at one time, too.

Mr. CALABRESI. He was a Cabinet member (HEW) in President Johnson's administration.

Senator THURMOND. He had two S's in his name?

Mr. CALABRESI. He had several Z's in it, I think.

Senator THURMOND. Well, how long have you been dean at the law school?

Mr. CALABRESI. This is my seventh year, and I am surprised to have survived that long—Dean Griswold, of course, being dean at Harvard, was able to survive much longer.

Senator THURMOND. How long did you teach there before you became dean?

Mr. CALABRESI. I have been teaching at Yale Law School since 1959, Senator.

Senator THURMOND. 1959?

Mr. CALABRESI. Yes, sir.

Senator THURMOND. Did you teach my good friend from Missouri, Senator Danforth?

Mr. CALABRESI. I did, indeed. He was one of my best students.

Senator THURMOND. Or was he in school with you?

Mr. CALABRESI. No, no. He was one of my students. [Laughter.] He is much younger. He tries to look older, and has for many years, but he was in fact much younger.

Senator THURMOND. How about the distinguished Senator from Pennsylvania? Did you teach him?

Mr. CALABRESI. No, I did not. He is older. He looks younger. Unlike Senator Danforth. [Laughter.]

Senator THURMOND. He was in school with you, I guess.

Mr. CALABRESI. No. He could have taught me, but he graduated before I went to law school.

Senator THURMOND. Well, everybody knows those two gentlemen have a high regard for Yale Law School. I have to say that.

Now, we had a professor here from Yale earlier today. Did you hear him testify?

Mr. CALABRESI. Yes, I did. He was also my student.

Senator THURMOND. He is a member of your faculty?

Mr. CALABRESI. Yes, he is.

Senator THURMOND. He testified against this nominee. Now, I am glad to see the head man testify for Judge Thomas.

Mr. CALABRESI. I think that most members of my faculty would deny that a dean was the head man. They would allow that somebody has to raise money for them, but they would not give me much more primacy than that.

Senator THURMOND. I am very pleased to see the dean, the top man in the law school, come here and testify on behalf of Clarence Thomas.

Mr. CALABRESI. Well, I am delighted to do that.

Senator THURMOND. I don't believe we have had any other dean testifying against him.

Mr. CALABRESI. You had Dean Griswold of the Harvard Law School testify against him.

Senator THURMOND. Well, he retired many years ago. [Laughter.]

You are the only dean that has testified for Clarence Thomas, I believe, and I want to congratulate you. A person of that stature's opinion always carries great weight.

I am just going to ask you two questions. Again, I appreciate your appearing here today and taking the time and lending your talent to this hearing.

Is it your opinion—as I understand, you taught Clarence Thomas in law school, did you?

Mr. CALABRESI. I did not actually teach him, but I knew him well at the law school.

Senator THURMOND. I see. Well, from your knowledge of him—and that is what really counts—your knowledge of him—is it your opinion that Judge Thomas is highly qualified and possesses the necessary integrity, professional competence, and judicial temperament to be an Associate Justice of the U.S. Supreme Court?

Mr. CALABRESI. Yes, I do. I believe that he has the integrity and the knowledge and the ability to be a very good Justice of the Supreme Court. I think he is fully as qualified as the people who have been appointed and confirmed to the Supreme Court over many, many years.

Senator THURMOND. Do you know of any reason why Clarence Thomas should not be made a member of the Supreme Court?

Mr. CALABRESI. No; I do not know any reason why he should not. Incidentally, Senator, my colleague, Drew Days, who testified against, when asked by this committee if Judge Thomas was qualified to be on the Court, quite candidly gave the same answer I did, that he was. But he testified against for other reasons. But in terms of qualification, he agreed that he was qualified.

Senator THURMOND. That is all the questions I have. I think your answer covered everything.

Mr. CALABRESI. Thank you.

Senator THURMOND. I think your answers are clear, direct, to the point, and you are for Clarence Thomas being on the Supreme Court.

Mr. CALABRESI. I am here testifying in favor of him.

Senator THURMOND. That is all I have to say. Thank you very much.

Mr. CALABRESI. Thank you.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

At the outset, I want to express regret that I was not here to hear the testimony of Dean Griswold and William Brown, representing the Lawyers Committee for Civil Rights Under Law. But we have a heavy schedule today with the Philadelphia Navy Yard, which took a little precedence for the past 45 minutes. So I have to absent myself, and I was especially sorry to miss the testimony of Bill Brown, who was a deputy district attorney when I was in office. I will peruse their report with care.

Dean Calabresi, it has been a good week for the Yale Law School, a good week and a couple of days, lots of good comments. When Senator Thurmond commented about you were the only dean and we found out there was one other dean, I think there was an alternative holding that Senator Thurmond might have used aside from the fact that he was a retired dean. It was only the Harvard Law School that he was dean of—

Senator THURMOND. Excuse me, what was that?

Senator SPECTER. The other dean was only from Harvard, Strom. This man is from Yale.

The CHAIRMAN. You think as little of Harvard, Strom, as he does, I know. [Laughter.]

Senator THURMOND. Who was the other dean?

The CHAIRMAN. Dean Griswold, former Dean Griswold from Harvard.

Senator THURMOND. Well, as the dean stated earlier, he is retired. He is no longer active.

The CHAIRMAN. The point the Senator was making was that even if he weren't retired, it wouldn't count for much because he is from Harvard. That was his point.

Mr. CALABRESI. You have not heard me say that.

Senator THURMOND. Well, I imagine that the chairman is right.

Senator SPECTER. Thank you, Senator Thurmond.

First, Dean Calabresi, I thank you for your letter to me of September 6, 1991 in response to my inquiry about Judge Thomas in terms of the preferential program at Yale. I would ask, Mr. Chairman, that Dean Calabresi's letter be made a part of the record as if read in full.

The CHAIRMAN. Without objection, it will be.

[The letter of Dean Calabresi follows:]



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GUIDO CALABRESI  
DEAN

September 6, 1991

The Honorable Arlen Specter  
United States Senate  
Committee on the Judiciary  
Washington, DC 20510-6275

Via FAX: 202-224-1893.

Dear Arlen,

It has taken me more time than I would have hoped to get the information about affirmative action plans at Yale Law School at the time Judge Clarence Thomas was admitted. The reason for this is that I was not then Dean and I did not wish to go merely on my recollection as a faculty member. After talking to the then Dean, the Associate Dean in charge of Admissions at the time, etc., I think I can be pretty confident of what I am writing you.

First, a bit of history. Affirmative action both in its sense of looking widely and more deeply and in its sense of some possible preferential treatment has deep roots at this Law School. In the 1860's Francis Wayland, the first Dean of the Yale Law School, wrote Samuel Clemens (Mark Twain) to ask him for scholarship money specifically for a black student, because the student was holding down two jobs while going to law school to pay his way. Clemens sent the money and wrote that he would not have given money to white students, but in view of the way blacks had been treated and were still treated, it was an appropriate thing to do. (This is apropos of the current debate about scholarships designated for particular groups.) The student who received that scholarship went on to win one of the first desegregation cases, a housing case, out of Maryland. And it was in his office, I believe, that Thurgood Marshall first started practicing law.

By the time Clarence Thomas applied, the number and quality of black applicants to the Yale Law School had increased greatly. In part for that reason, a few years before his application, the faculty voted to create a more formal structure than the casual "affirmative action" approach, that had been in place earlier. The program that was put in was essentially a "set aside" program. Up to 10% of the places in the entering class were set aside for members of minority groups. The members of these groups would compete with each other for these places. A minimum standard was also applied, and a rather interesting one.

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Before this program was put into effect members of minority groups were pretty much automatically accepted if it was thought that they could do the work well. The increasing size, quality of the applicant pool, and availability of places at other law schools, which had earlier not been as open to minority students as Yale, led to a different "minimum standard." Students would now be admitted only if it was believed that they were of such ability as to make it a distinct advantage for them to come to Yale Law School as against any other law school. In other words, while, before, anyone who would do well here was likely to be admitted, even if he or she might get as much or more from another school, at the time Judge Thomas was admitted the standard was to accept only those of such quality that coming to this School was a clear benefit.

As to Judge Thomas himself, I cannot say whether he would have been admitted apart from this program. This is because admissions among people of top ability are always highly subjective and so, unless I could speak to those who actually read his files (some of whom are dead), I could not give an answer to the question. Frankly, even if I could, I would not. It has long been the policy of the Law School not to divulge information with respect to admission of particular students. Our policy, I believe, is now required as a matter of law by the Buckley Amendment.

Not many years after this program was put in effect, it started to fall of its own weight. The quality and numbers of minority applicants continued to increase at such a rate that a "set aside" program seemed unnecessary and undesirable. By the time the Bakke case (which held similar programs invalid) came along, our "set aside" program was well on its way to being abandoned. Today all applicants are considered as part of one pool and I believe that our minority students are the equal of, or superior to, the whole student body in any other law school. Whether some faculty readers give advantage to individual applicants because they are members of minorities, is impossible to say. But the same is true as to any number of other possible characteristics for admission. There is one large pool and every member of the faculty reads files and applies to them his or her subjective judgment. Each file is read by three different faculty readers and this, too, tends to mitigate the effect of any one reader's enthusiasms.

I hope this is of help to you as you begin what undoubtedly will be a very interesting set of hearings.

Best always,



Senator SPECTER. Dean Calabresi, a good bit of our discussion has focused on Clarence Thomas' background in a sense, as opposed to Judge Thomas' writings. And some have said that the writings are a much better indication of the man than his background in terms of his roots and his previous position.

In looking at the critical issue of human rights, civil rights, affirmative action, I would be interested in your evaluation of Judge Thomas in comparing the writings which are much more restricted, constricted, than his background in terms of trying to make a prediction, which is essentially our job on this committee. How would you look at that?

Mr. CALABRESI. I cannot make a certain prediction. I wish I could. Predictions aren't of that order. All I can say is that I think that Judge Thomas is a person with respect to whom there is a significant chance—a significant chance—that were he on the Supreme Court of the United States he would be a powerful figure in the defense of civil rights.

That is more than is the case with most of the people who have been nominated by the last two administrations. If I am faced with a chance as against no chance, I will go for that chance. I cannot say I am confident. I do not think that one can be that sure, and I will be quite candid on that. On the other hand, I do think that there is enough in his background and enough in his sensitivity and enough in what he has said here to make me think that he may well be a significant figure.

Frankly, one can cut this another way. If I am wrong, he will join a majority that is already such a strong majority that, though it will make some difference, it will not make that much difference. But if I am right, it will make an enormous difference the other way.

Incidentally, I would cite one person, the Justice for whom I worked, of whom many of the same things were said, Justice Black. If one looked at certain things in his background, one would have said—some of his speeches, some of his things, one would have said he would not have been the kind of Justice that he was. If one looked at other things in his background, the things he had to struggle against, one would say that there was a chance. In that case, the chance came through. Did it ever.

Senator SPECTER. Dean Calabresi, on philosophical grounds, do you agree with Judge Thomas on affirmative action?

Mr. CALABRESI. No, I don't. I think affirmative action is a very complicated issue. It is not a simple kind of thing. I don't mean his position is simple, but I sometimes think that the people who have taken opposite views tend to make it more simple than it is.

One of the key things for with respect to affirmative action is: Is affirmative action really something that is benefiting a disadvantaged group where the bulk of the burdens are being borne by people who have all the advantages? And then I am for it, and it is in that respect that I disagree with Judge Thomas.

On the other hand, it often is the case that what is described as affirmative action is not those who have putting a burden on themselves for the benefit of the have-nots, which is admirable and should be supported, but it is those who have putting a burden on one group of have-nots in order to help another group of have-nots.

And that is much more of a problem. I think many of the issues which turn around affirmative action today turn on questions of which of these two things it is.

I think that Judge Thomas has been too sensitive to this second part and thinks that it always is this way. I think that some of the people on the other side have been too insensitive to the existence of that.

There has been discussion about affirmative action in a place like Yale and affirmative action in the workplace. And in many ways, the workplace is a more important place to have affirmative action than a place like Yale. On the other hand, it should be said that those who may lose because of affirmative action at Yale, those who are not admitted to Yale because of affirmative action, will end up going to Harvard. And that is not the end of the world. While in the workplace, those who may lose may be people who are also in need.

All in all, I still come out in favor of it, but it is on that issue that I think differences turn and why it is such an emotional issue, and properly an emotional issue.

Senator SPECTER. So notwithstanding the fact that you have a different philosophical approach to affirmative action than Judge Thomas and in fact disagree with him, you conclude that his view of affirmative action is within the realm of reasonableness and does not rule him out as having a keen sense of civil rights?

Mr. CALABRESI. If his views on affirmative action were not within the realm of reasonableness, neither would that of a great many people who currently are on the Supreme Court. His view is well within the range of that of others who have been confirmed.

Senator SPECTER. Well, Dean Calabresi, I don't know that that comparison necessarily holds up too well.

Mr. CALABRESI. It worries me. It worries me. But, in fact, I think that Judge Thomas' views are well within the range of reasonableness.

Senator SPECTER. He was characterized by one of the witnesses this morning as being from the radical right. Would you disagree with that characterization?

Mr. CALABRESI. Yes, I would disagree with that characterization. At least if one looks at the Court today, if one looks at the courts today, even more than the Supreme Court, if one looks at people who have been appointed in the last 24 years, Clarence Thomas is not on the radical right.

I might wish that he were as I might wish that the center were some place else, but the center has moved a long way.

Senator SPECTER. Dean Calabresi, other colleagues have joined us, and we are trying to move along. So I will ask you just one more question, and that is: The American Bar Association has rated Judge Thomas only as qualified. Would you agree with that, or would you give him a well-qualified rating for the U.S. Supreme Court?

Mr. CALABRESI. Senator Specter, I don't mean this to sound snide, but my ratings, if I were doing it, would be far more severe than those of the American Bar Association. If the American Bar Association rates, as they did, Justices Kennedy and Souter as well

qualified or highly qualified, I would certainly rate Judge Thomas as highly qualified.

My own judgment would have been to rate neither of the past two nor some who have been appointed before as highly qualified. I would save highly qualified for very, very few people. But on the basis of the ratings that they have exercised, he is as qualified as the others, and if they are highly qualified, so is he.

Senator SPECTER. Thank you very much, Dean Calabresi.

Thank you, Mr. Chairman.

The CHAIRMAN. Dean, thank you—oh, I am sorry. Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I have no questions of this witness. I would like to ask, though, whether or not we are going to finish all the panels that are on today's list.

The CHAIRMAN. Come heaven or high water, we are going to do it. That is why I didn't break for lunch. That is why I stayed in this chair, and we are going to go right through votes, even if it means I end up missing some votes. So we are going to keep going.

Dean, thanks a million.

Mr. CALABRESI. Thank you very much.

The CHAIRMAN. I really do appreciate your coming.

Now, our next panel is a panel of very distinguished Americans: Ms. Marcia Greenberger, an attorney at the National Women's Law Center, who authored the report on Judge Thomas that argues that Judge Thomas' record demonstrates a lack of support of women's rights; Ms. Judy Lichtman, of the Women's Legal Defense Fund, which wrote a report arguing that Judge Thomas' endorsement of an article by Thomas Sowell threatens working women's rights; and Prof. Patricia King, a professor at Georgetown University Law Center, who teaches family and poverty law. Professor King believes Judge Thomas' record is, as I understand it, antithetical to the interest of women and blacks.

If I have misrepresented your positions in any way, please at the very outset make it clear for the record that I did.

With that, why don't we start in the order that I—or does the panel have a desired way to begin?

Ms. LICHTMAN. We do. If it pleases you, can we have Professor King begin?

The CHAIRMAN. Of course.

Ms. LICHTMAN. Then we will proceed with Marcia Greenberger.

The CHAIRMAN. Professor King, why don't we begin with you.

**STATEMENTS OF A PANEL CONSISTING OF PATRICIA KING, PROFESSOR, GEORGETOWN LAW SCHOOL; MARCIA GREENBERGER, ON BEHALF OF THE NATIONAL WOMEN'S LAW CENTER; AND JUDITH LICHTMAN, ON BEHALF OF THE WOMEN'S LEGAL DEFENSE FUND**

Ms. KING. Thank you very much. Chairman Biden and members of the committee, as a black woman, it is exceedingly difficult for me to oppose the nomination of a black individual who has known great personal struggle. Nevertheless, Judge Thomas' extensive record and personal posture is so antithetical to the interests of

women and blacks—especially black women—that I feel an obligation to testify against his nomination.

Much has been said of Judge Thomas' rise from Pin Point, GA, to the Federal bench. And without question, the Supreme Court should include people who have endured such struggles. But we must recognize that that alone is not enough.

I don't talk often publicly about my own background, but I think it is necessary here to put Judge Thomas' life story—dramatic and compelling as it is—into the context of life in black America. Judge Thomas' background is not unique among African-Americans of our generation. And virtually all of us over the age of 40 have at least one exceptional grandparent who has been injured and severely humiliated by racism in America.

I grew up during segregation with my sister in a female-headed household in a public housing project in Norfolk, VA. I attended segregated schools through high school and never knew any white contemporaries. I was able to apply to one college because we did not have money for multiple applications. I was able to attend Wheaton College in Norton, MA, because my uncle put a second mortgage on a house he owned—the only piece of real property owned by anyone in my family—in order to pay college bills.

I am very reluctant to parade that family history in public, but not because I am ashamed of my background. I am proud of my mother's strength and tenacity and the love and determination she employed in raising my sister and me. I am grateful to my uncle for what he gave to me and to the other members of my family for the encouragement they gave me. I am profoundly grateful to a high school teacher who taught, inspired, and pushed me to achieve. And I am proud of them all as strong black people who battled through racism and material poverty to hold themselves in dignity and to forge spiritually rich lives. I don't talk about it simply because it has no impact on my capacity to function effectively as an adult or professionally as a lawyer and legal educator. Moreover, my story is not unique in the black community, and frankly I don't want people's sympathy or their condescension.

My background was not a predictor of my performance as a Government worker in the State, Justice, and Health, Education and Welfare Departments, or during the time I worked at the Equal Employment Opportunity Commission. Some of that Government service, by the way, was rendered the Nixon and Reagan administrations. Nor could that background have served as a predictor of success in my 18-year career as a law professor at Georgetown University.

Frankly, I don't think Judge Thomas' background is any more a predictor of his future service on any bench than mine has been for my career.

Though there are similarities between Judge Thomas' background and my own, it seems to me that there is an attitudinal difference that separates us. I readily acknowledge that some of my successes resulted from affirmative action—my admission to Harvard Law School, for example—and from the help and support I received from others. In remembering where I came from, I also remember very bright young black people who were not as fortunate as I. They did not have my mother and my aunts and my uncles.

But if they have had a chance, they could have made some real contributions to this society. But affirmative action came too late for them; they had slipped away before it was firmly established in the late 1960's when I went to law school. Somehow Judge Thomas seems not to remember those he must have encountered along the way who were lost to the darkness simply because there was no help for them. I surely worry that that lack of memory and empathy in someone of my race who is proposed as a Justice for the Supreme Court.

Even his behavior toward his own family raises serious concerns. While Judge Thomas gives his grandfather great credit for his success, he has not been so generous to his sister, Emma Mae Martin. In describing his rise from humble beginnings, he has frequently criticized her need to turn to welfare for a period in her life, saying: "She gets mad when the mailman is late with her welfare check. That's how dependent she is." He has criticized her children as well: "What's worse is that now her kids feel entitled to the check, too. They have no motivation for doing better or getting out of that situation."

Judge Thomas' willingness to castigate his sister publicly for personal gain is deeply troubling not only for his opportunism but also for what it reveals about his lack of compassion and understanding about his own sister's struggle to overcome great obstacles. Similarly, Judge Thomas' ability to extend compassion to others whose cases may come before the Court is also in question since the situation faced by Emma Mae Martin is one shared by many other black women.

The story of the women in Judge Thomas' family demonstrates an ethos of family support, resourcefulness, and interdependence—not dependence. When husbands left the family or relatives fell ill, it was the women who carried the burden for the family—at great cost to any personal ambition. At the same time, though, their story makes plain the limited range of opportunities and choices available to black women, especially those who are single heads of households. Judge Thomas, however personal and painful his experiences were and are, because of racism, did not face the multiple barriers of race and poverty when compounded by sex discrimination and family responsibility. Moreover, in his oft-repeated recitation of his personal history, little space or respect is given to the intense struggle of these women. Yet stories like these are at the heart of the heroic rise of our people, and Judge Thomas' insensitivity to that aspect of his personal and our communal life is deeply troubling.

Judge Thomas' record shows no understanding of the imperative to provide opportunities and choices to black women. The notion of choice, usually perceived as limited to issues of reproductive freedom, is really a much broader concern for black women. Black women understand that no matter how hard they work and no matter how well prepared they might be, workplace choices and opportunities for them may be limited. The work experiences of Judge Thomas' mother and sister are not unique. African-American women historically have been represented in substantial proportions in the work force. However, we have yet to reap the full economic rewards of that participation. While it is true that many

of us have improved our status as workers, many more remain in low-wage jobs. Even when women hold equal amounts of education, job training, and work experience, they are three times more likely to earn low wages as white men. African-American women are four times as likely to be low wage workers. The average family income for black women is less than that of white women. The unemployment rate is higher for black women than for white women. Black women—like Judge Thomas' sister—are more likely to hold several low-wage part-time jobs with no health insurance or other benefits.

As demonstrated by Judge Thomas' own experience, the status of black women in the workplace contributes to their poverty and to the poverty of their families. It also reflects the dearth of choices available to them as black women—in particular black women heading households in rural Georgia.

Judge Thomas' positions on affirmative action, wage discrimination, class action litigation, and other proven remedies for discrimination may possibly become law and public policy that would further limit the choices of black women in the workplace.

Of equal concern to me is Judge Thomas' record on reproductive freedom. That issue is all too often viewed through the narrow prism of abortion and thought to be of interest only to white women. That is not the case. The fundamental right to privacy, including the right to abortion, is at the core of equality for all women, including black women and other women of color. If women cannot control their own bodies, it is difficult, if not impossible, for them to fight for or enjoy the other rights to which they are entitled.

Black women interpret this right as the right to choose to have a baby, as well as the right to choose not to. For black women, the right to reproductive freedom also means access to information about family planning and to safe and affordable health care, including prenatal and postnatal care. No one needs a broad array of reproductive choices more desperately than black women, poor women, and women with children.

Before he was nominated to the Court, Judge Thomas made speeches, he wrote articles, and signed onto reports that criticized or attacked constitutional protections of reproductive freedom that have enhanced the power of black women over their lives. His post-nomination retreat from his record, his refusal to discuss *Roe* to any meaningful degree, and his claims that he has never thought seriously about these issues provides us with scant comfort.

A decision to overturn *Roe* will have drastic implications for our lives and our health. Women who are captives of poverty or geography, including many women of color, will be robbed of their choices and again forced to risk their lives in back alleys.

In conclusion, I want to repeat that this has been a most difficult decision for me to make. Our role models are all too few, and Judge Thomas' personal achievements are indeed impressive.

However, we cannot afford to let those achievements blind us to the reality of his record on issues of critical importance to black women—including, but not limited to, his apparent lack of compassion and understanding of the struggle of the black women in his own life.

Our role models—and our Supreme Court Justices—should include not only those men and women who have demonstrated personal achievements, but also those men and women who have demonstrated an understanding of what it takes to rise up and out of oppressive circumstances.

All of us who have made it have an obligation to help others, and to recognize that others need our help. Judge Thomas has been able to dream and to reach for his dreams. Yet, he has ignored the need for or worked to deny that choice to others. He should not be confirmed.

Thank you.

[Prepared statement follows:]

Testimony of Patricia King  
Professor  
Georgetown University Law Center

Chairman Biden and members of the Committee, I appreciate the opportunity to testify before you on the nomination of Judge Clarence Thomas to the United States Supreme Court.

As a black woman, it is difficult for me to oppose the nomination of a black individual who has known great personal struggle. Nevertheless, Judge Thomas's extensive record and personal posture is so antithetical to the interests of women and blacks -- especially black women -- that I feel an obligation to testify against his nomination.

Much has been said of Judge Thomas' rise from Pinpoint, Georgia to the federal bench. Without question, the Supreme Court should include people who have endured such struggles. But we must recognize that that alone is not enough.

I don't often talk publicly about my own background, but I think it is necessary here to put Judge Thomas' life story -- dramatic and compelling as it is -- into the context of life in black America. Judge Thomas' background is not unique among African Americans of our generation. And virtually all of us over the age of forty have had at least one exceptional grandparent who has been injured and severely humiliated by racism in America.

I grew up during segregation with my sister in a female headed household in a public housing project in Norfolk, Virginia. I

attended segregated schools through high school and never knew any white contemporaries. I was able to apply to only one college because we did not have the money for multiple applications. I was able to attend Wheaton College in Norton, Massachusetts, because my uncle put a second mortgage on a house he owned -- the only piece of real property owned by anyone in my family -- in order to pay college bills.

I am reluctant to parade that family history in public, but not because I am ashamed of my background. I am very proud of my mother's strength and tenacity and the love and determination she employed in raising my sister and me. I am grateful to my uncle for what he did and to the other members of my family for the encouragement they gave me. I am profoundly grateful to the high school teacher who taught, inspired, and pushed me to achieve. And I am proud of them all as strong black people who battled through racism and material poverty to hold themselves in dignity and to forge spiritually rich lives. I don't talk about it simply because it has no impact on my capacity to function effectively as an adult or professionally as a lawyer and a legal educator. Moreover, my story is not unique in the black community and, frankly, I don't want either people's sympathy or their condescension.

My background was not a predictor of my performance as a government worker in the State, Justice and Health, Education and Welfare Departments or during the time I worked at the Equal Employment Opportunity Commission. Some of that government service, by the way, was rendered during the Nixon and Reagan

administrations. Nor could that background have served as a predictor of success in my eighteen-year career as a law professor at Georgetown University or in my service on a broad array of government commissions and panels dealing with the most complicated and delicate problems of medical and legal ethics that our country has faced in the last decade and a half.

And, frankly, I don't think Judge Thomas' background is any more a predictor of his future service on any bench than mine has been for my career.

Though there are similarities between Judge Thomas' background and my own, it seems to me that there is an attitudinal difference that separates us. I readily acknowledge that some of my successes resulted from affirmative action -- my admission to Harvard Law School, for example -- and from the help and support I received from others. In remembering where I came from, I also remember very bright young black people who were not as fortunate as I. They did not have my mother or my aunts and uncles, but if they had had a chance, they could have made some real contributions to this society. But affirmative action came too late for them; they had slipped away before it was firmly established in the late 1960s when I went to law school. Somehow Judge Thomas seems not to remember those he must have encountered along the way who were lost to the darkness simply because there was no help for them. I surely worry about that lack of memory and empathy in someone of my race who is proposed as a Justice for the Supreme Court.

Even his behavior towards his own family raises serious

concerns. While Judge Thomas gives his grandfather great credit for his success, he has not been so generous to his sister, Emma Mae Martin. In describing his rise from humble beginnings, he has frequently criticized her need to turn to welfare for a period in her life, saying, for example: "She gets mad when the mailman is late with her welfare check. That's how dependent she is." He has criticized her children as well: "What's worse is that now her kids feel entitled to the check, too. They have no motivation for doing better or getting out of that situation."<sup>1</sup>

Judge Thomas' willingness to castigate his sister publicly for personal gain is deeply troubling not only for its opportunism, but also for what it reveals about his lack of compassion and understanding about his own sister's struggle to overcome great obstacles. Similarly, Judge Thomas' ability to extend compassion to others whose cases may come before the Court is also in question since the situation faced by Emma Mae Martin is one shared by many other black women.

Judge Thomas' father abandoned his family when he and his siblings were very young. As is the case in many female-headed households, the family was poor. Judge Thomas' mother supported her family by picking crabs at five cents a pound. When a fire destroyed their home and their belongings, Mrs. Thomas could no longer support her family on her salary (she moved from picking crabs to cleaning houses), and sent the children to live with

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<sup>1</sup> New York Times, "Thomas's Journey on Path of Self-Help," July 7, 1991.

relatives. While the boys lived with their grandfather, an independent middle-class businessman, Judge Thomas' sister was sent to live with her aunt. She graduated from high school, married, and had children. When her husband left, she supported her children by holding down two minimum wage jobs. Only when that aunt suffered a stroke and needed care was Ms. Martin forced to turn to welfare; like many women, Ms. Martin had no choice but to quit her job in order to provide such care. She was on welfare for four or five years before returning to the workforce; she is now employed as a cook.<sup>2</sup>

The story of the women in Judge Thomas' family demonstrates an ethos of family support, resourcefulness and interdependence -- not dependence. When husbands left the family or relatives fell ill, it was the women who carried the burden for the family -- at great cost to any personal ambition. At the same time, though, their story makes plain the limited range of opportunities and choices available to black women, especially those who are single heads of households. Judge Thomas, however painful his personal experiences were, and are, because of racism, did not face the multiple barriers of race and poverty when compounded by sex discrimination and family responsibility. Moreover, in his oft-repeated recitation of his personal history, little space or respect is given to the intense struggle of these women. Yet stories like these are at the heart of the heroic rise of our people and Judge

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<sup>2</sup> L.A. Times, "Sister of High Court Nominee Traveled Different Road", July 5, 1991, p. 4 col. 1.

Thomas' insensitivity to that aspect of his personal and our communal life is deeply troubling.

Judge Thomas' record shows no understanding of the imperative to provide opportunities and choices to black women. The notion of "choice," usually perceived as limited to issues of reproductive freedom, is really a much broader concern for black women:

Choice is the essence of freedom. It's what we African-Americans have struggled for all these years... the right to select our own paths, to dream and reach for our dreams. The right to choose how we would or would not live our lives.<sup>3</sup>

Black women understand that no matter how hard they work, and no matter how well prepared they might be, workplace choices and opportunities for them may be limited. The work experiences of Judge Thomas' mother and sister are not unique. African-American women historically have been represented in substantial proportions in the labor force; however, we have yet to reap the full economic rewards of that participation. While it is true that many of us have improved our status as workers, many more remain in low wage jobs.<sup>4</sup> Even when women hold equal amounts of education, job training, and work experience, they are three times more likely to

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<sup>3</sup> "We Remember", Statement of African-American Women for Reproductive Freedom, (1989).

<sup>4</sup> For example, in 1989, 27.3 percent of employed black women were in low-paying service occupations, as compared to 16.1 percent of white women. M. Power, "Occupational Mobility of Black and White Women Service Workers," (Presented at the Institute for Women's Policy Research Second Annual Women's Policy Conference, June 1990) (unpublished manuscript).

earn low wages as white men.<sup>6</sup> African-American women are four times as likely to be low wage workers.<sup>7</sup> The average family income for black women is less than that of white women.<sup>8</sup> The unemployment rate is higher for black women than for white women.<sup>9</sup> Black women -- like Judge Thomas' sister -- are more likely to hold several low-wage part-time jobs with no health insurance or other benefits.

As demonstrated by Judge Thomas' own experience, the status of black women in the workplace contributes to their poverty and to the poverty of their families. The number of black women who head households is growing; to the extent that single parents fare badly in the labor market, or are unemployed, their children suffer. That Judge Thomas' mother and sister have worked as crab pickers, cooks, and maids, as have thousands of other black women, is not an accurate indication of their abilities, but rather a reflection of the dearth of choices available to them as black women -- in particular black women heading households in rural Georgia.

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<sup>6</sup> National Displaced Homemakers Network and the Institute for Women's Policy Research, "Low-Wage Jobs and Workers: Trends and Options for Change", Washington, D.C. 1989.

<sup>7</sup> *Id.*

<sup>8</sup> On average, the 1989 median annual earnings of black women working year-round and full-time was \$17,389 -- 61% of white men's annual earnings of \$28,541. The figure for white women for the same period was \$18,922, or 66% of the annual earnings of white men. National Committee on Pay Equity, Newsnotes (March 1991) at 6.

<sup>9</sup> Overall, 11 percent of black women who desire to work are unemployed, compared with 4 percent of white women. Staff Report, United States Civil Rights Commission, The Economic Status of Black Women: An Exploratory Investigation, October 1990.

Judge Thomas' positions on affirmative action, wage discrimination, class action litigation, and other proven remedies for discrimination may possibly become law and public policy that would further limit the choices for black women in the workplace. For example, Judge Thomas has repeatedly attacked well-established Supreme Court case law on affirmative action -- even when developed to remedy proven egregious discrimination and despite its demonstrated effectiveness in expanding equal employment opportunity. As head of the EEOC he deliberately chose not to seek goals and timetables in settlement agreements and consent decrees, changing course only in reluctant response to vigorous objections from members of Congress. He drastically cut back enforcement of the Equal Pay Act, the law that prohibits gender-based differentials in jobs that are equal or substantially equal; and, notwithstanding the EEOC's obligation to enforce the laws prohibiting gender- and race-based wage discrimination, he adopted a cramped analysis of Title VII's application to such discrimination that left the claims of many women unremedied. And, in spite of the proven effectiveness of class action litigation, Judge Thomas criticized the EEOC's reliance on that strategy and reduced the resources devoted to it -- causing a substantial reduction in the number of class action cases filed by the agency.

Of equal concern to me is Judge Thomas' record on reproductive freedom. That issue is all too often viewed through the narrow prism of abortion and thought to be of interest only to white women. That is not the case. The fundamental right to privacy,

including the right to abortion, is at the core of equality for all women, including black women and other women of color.\* If women cannot control their own bodies, it is difficult -- if not impossible -- for them to fight for or enjoy the other rights to which they are entitled.

Black women interpret this right as the right to choose to have a baby, as well as the right to choose not to. For black women, the right to reproductive freedom also means access to information about family planning options and to safe and affordable health care, including pre-natal and post-natal care.<sup>10</sup> No one needs a broad array of reproductive choices more desperately than black women, poor women, and women with children.<sup>11</sup> When women's reproductive freedom is curtailed, black women and other women of color and their families suffer first and most deeply.

Before he was nominated to the Court, Judge Thomas made speeches, wrote articles, and signed on to reports that criticized or attacked constitutional protections of reproductive freedom that have enhanced the power of black women over their own lives. His post-nomination retreat from his record, his refusal to discuss Roe

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\* National Council of Negro Women and Communications Consortium Media Center, "Women of Color Reproductive Health Poll", August 30, 1991. The survey respondents included African-American women, Latinas, Asian women, and Native American women. About three-fourths of those responding to the survey agreed that the decision to have an abortion is one that every woman should make for herself.

<sup>10</sup> Statement of African American Women for Reproductive Freedom.

<sup>11</sup> Statement of African-American Women for Reproductive Freedom; Women of Color Reproductive Health Poll (From FN. 9).

to any meaningful degree, and his claims that he has never thought seriously about these issues provides us with scant comfort. A decision to overturn Roe will have drastic implications for our lives and our health. Women who are captives of poverty or geography, including many women of color, would be robbed of their choices and again forced to risk their lives in back alleys.

In conclusion, I want to repeat that this has been a most difficult decision for me to make. Our role models are all too few, and Judge Thomas' personal achievements are indeed impressive. However, we cannot afford to let those achievements blind us to the reality of his record on issues of critical importance to black women -- including, but not limited to, his apparent lack of compassion and understanding of the struggle of the black women in his life. Our role models -- and our Supreme Court justices -- should include not only those men and women who have demonstrated personal achievements, but also those men and women who have demonstrated an understanding of what it takes to rise up and out of oppressive circumstances. All of us who have "made it" have an obligation to help others, and to recognize that others need our help. Judge Thomas has been able to dream and to reach for his dreams; yet he has ignored the need for or worked to deny that choice to others. He should not be confirmed.

The CHAIRMAN. Professor, you went well beyond the 10 minutes. I did not cut you off, because, obviously, it was such a heartfelt statement you were making.

Ms. KING. Thank you, Senator.

The CHAIRMAN. It was as moving statement. I understand the degree of difficulty, I think I understand—let me rephrase that, I appreciate how difficult it is for you, a proud woman who probably has been reluctant to talk about her past, not for lack of pride, but for concern that others may react like maybe many people did, black and white, with a sense of sympathy. And knowing of you and your reputation, that is the last thing you want or need or seek.

But I appreciate your testimony, and I hope you all appreciate—I know that your two colleagues, knowing this place as well as they do, will fully appreciate what is about to happen, and that is there is only about 2½ minutes left for me to go and vote. If I miss the vote, I assume, Professor, you will do what you would do for a student in class and write a note for me, indicating that you were the reason I was late.

With that, we will recess. I am told that we are going to have three votes back to back. We try to catch the very beginning of the third vote and get back to start, so we will recess for approximately 15 to 17 minutes. We will, I say to the last panel, we will in fact have the last panel, made up of Ms. Holyfield, Bryant, and Frazier, we will hear their testimony today, but keep in mind we are going to honor the fact that Yom Kippur is tomorrow and the observance begins late this afternoon, so we are going to try very hard to finish by 4.

Again, I will recess for 15 minutes—

Senator SPECTER. Senator Biden.

The CHAIRMAN. I am sorry, Senator Specter, I yield the gavel to you. I am going to go vote, and you can recess whenever you feel appropriate.

Senator SPECTER [presiding]. Thank you very much, Mr. Chairman.

As Senator Biden noted, we are in the midst of a vote, so I have gone over to vote and I have come back and had to leave just as Professor King was testifying. I have tried to read your statements on the subway, but have not got too far on reading the statements.

I did get into Ms. Lichtman's statement and noted the concern on the issue of women's rights and I believe on the abortion issue. Let me ask a question of you women, generally, and that is, a central core of concern has been raised by a number of Senators about Judge Thomas not answering how he is going to rule on *Roe v. Wade*. Judge Souter, now Justice Souter, refused to answer that question, as well, and nine Senators voted against Judge Souter on that basis.

Do you think that—I am sorry, Ms. Lichtman and Ms. Greenberger have not made statements yet, so you—

Ms. LICHTMAN. I thought you were significantly advantaged, as no one else had had the opportunity to hear our statement, but we are prepared to answer your questions, if you would prefer to go on.

Senator SPECTER. I think that is a core question. Candidly, it is not the core question for me, but I think it is for some Senators, and there has been a contention—I have stated my view and it is worth just a momentary summary.

I think I have pressed hard on answers to questions, but I believe that when it comes to an issue like *Roe v. Wade* or a specific case. You have to have it in the context of a specific factual situation, you have to have briefs, arguments, deliberation among the Justices and then a decision. There are a lot of permutations of the way the issue can arise.

But I would be interested to hear your views on that question. Professor King.

Ms. KING. As I stated, Senator Specter, my opposition to Judge Thomas has a number of sources, not just his lack I think of understanding about the reproductive needs of black women, but I do indeed believe that the right of privacy, a right of privacy that includes a broad range of choice, is one of the bottom principles or basic principles that I would look for in a Supreme Court Justice. It is not the only one.

I feel that way about the principles articulated in *Brown v. Board of Topeka*, and I would be opposed to any nominee whose record did not demonstrate an appreciation of the fundamental nature of that principle for our jurisprudence.

I am not suggesting that he needs to be examined on *Roe v. Wade* as a specific case holding. I am, in fact, concerned about his views about the right to privacy and reproduction.

Senator SPECTER. So, you would not disqualify him, Professor King, solely on his failure to answer how he would rule on *Roe v. Wade*?

Ms. KING. Not on how he would rule on that specific case, but I would disqualify him, if I were not satisfied about how he felt about the right to privacy and reproductive choices, more generally, yes.

Senator SPECTER. So, you would want an inquiry as to his philosophy?

Ms. KING. Yes, indeed, Senator.

Senator SPECTER. Well, he testified fairly extensively about his recognition of a right to privacy and a right to marital privacy and a right to privacy for those who were not married. Do you think his testimony went far enough in that respect?

Ms. KING. Let me say, Senator, that by examining his record before these hearings and listening as well as I could, with my other responsibilities while the hearings were going on, yes, he indeed made those statements, but I would say that he certainly was not as clear as I would like him to be about exactly what right to privacy he was affirming.

Senator SPECTER. Ms. Greenberger, how do you respond to those issues?

Ms. GREENBERGER. I think there are several bases for my concerns with Judge Thomas' testimony here with respect to the right to privacy in general, as well as covering the issue of abortion in particular that go beyond the concerns with respect to Judge Souter, which I had, as well.

First of all, in the case of Judge Thomas, he came to these hearings with a record of having criticized the right to privacy, having endorsed statements of others and reports, especially the Lehrman article that has been discussed in some detail in a lavish way.

Senator SPECTER. Well, anything besides the Lehrman article?

Ms. GREENBERGER. Yes, well, the White House Study Group, which he endorsed and then said he had not read. There was his citation to *Roe v. Wade* in an article that he had written with some implicit criticism of it as a controversial case, his discussion of the right to privacy as being an invented right in another forum, his discussion in political context of abortion as an issue that was troublesome. I think there are a number of specific statements that were a part of his record before these hearings that were the cause for concern, to begin with.

His statements with respect to his record I think added to the concern immeasurably. This is an issue, regardless of where one ultimately comes out, which is enormously important to every American, and certainly to every American woman and her life and health. For him to have picked out the Lehrman article, regardless of where he was located when he did so, and say that it was a splendid article, a splendid example of the application of natural law, had to have signaled, because it was such an extreme article, taking a position, in essence, that abortion should be illegal across the country, a gross insensitivity to the importance of the issue, if one credits at full value his statement that he skimmed it at best and barely read it.

The fact that during these hearings, after so much had been made of the article, he said that he had not even read it, really I think was a devastating comment to those of us who looked for something that we could come away with, a sense of reassurance that he was approaching this with an open mind. He certainly said he had an open mind, but when he discounted these extreme statements and treated the issue in such a cavalier way, however he were to come down on it, I think that in and of itself set off enormous concern and worry and exacerbated what had been a very troublesome record.

Finally, I add the contrast between his answers in the area of privacy, which were not very specific, which never did deal with the explicit right to privacy for an individual who was not married in any clear way, let alone moving up to some of the more specific principles underlying *Roe*. When we contrast that failure to respond to the very specific responses he gave to other issues that are of burning importance that will come before the Court, where he not only talked about the legal analysis, but the bottom line holdings, I think that we see a very different and very extreme cause for worry here that is even greater than it was in the case of Judge Souter.

Senator SPECTER. Ms. Greenberger, let us examine that for just a minute. He had the single line approving the Lehrman article and he commented about that, that he was crediting Lehrman, because he was in Lehrman Hall, and the Lehrman dealt in detail with the abortion issue, but Judge Thomas' comment about Lehrman did not deal with it at all.

Then in one of his speeches he had made a reference to *Roe v. Wade* as being an issue that the conservatives sharply disagreed with. Then you have his refusals to respond on the question on privacy beyond a short distance on agreeing that there was a right to privacy, marital privacy, and then privacy for unmarried people. Then you do have him answering some questions, which he may have been ill-advised to answer, on the separation of church and state, for example, the establishment clause, and I wondered—nobody asked him whether he knew that case was on the docket for next year, but I do not think anybody can be expected to know everything about the docket. He answered to some extent on the exercise clause, he answered the death penalty question, and that is about it.

Ms. GREENBERGER. Well, those are quite a number of burning issues, no doubt.

Senator SPECTER. All right.

Ms. GREENBERGER. I would like to go back for 1 minute to some of the—

Senator SPECTER. I would like to just review the record as to your basis and just understand that those are the operative facts that lead you to conclude that if he answered on the ones I articulated and did not further on the abortion question, that leads you to your concern and essentially to your opposition.

Ms. GREENBERGER. I think, as I said, there were multiple bases. If you look first at the Lehrman article and the fact that he said he complimented it because he was in Lehrman Hall, the article is a radical approach to banning abortion across the country. If one wanted to be gracious and kind in making a speech in a hall named after someone, there were many, many ways that he could have complimented Mr. Lehrman. There were many things he could have said that he admired about the article in a way that was qualified.

We saw that he was very skilled at qualifying his answers over all these days. It was not a qualified statement, and the fact that he called it a throw-away, to me, if we credit the fact that he skimmed the article, it was as throw-away, it was, in essence, a gratuitous compliment on an issue of such burning importance in this country, an issue that is of such heartfelt importance to the health and lives of women, I cannot credit that as an acceptable response. That is my first basis.

With respect to his saying that conservatives find *Roe v. Wade* controversial, he called himself a conservative. He did not distance himself in any way. That is, in fact, his trademark, that he is a conservative. He did not say some conservatives may view it as controversial and, as we all know, some conservatives might not. He pulled himself in. These were implications, these were statements, these were praise.

The fact that he signed onto the White House Working Committee report on the family and did not read it, and to this point had not in the hearing really gone through it—at best, for him, if we credit all of those statements as true, show the kind of insensitivity that Professor King talked about and is so concerned about.

Senator SPECTER. Ms. Lichtman.

Ms. LICHTMAN. Senator, can I jump in for 1 second?

Senator SPECTER. By all means, it is your turn.

Ms. LICHTMAN. I want to lay out with you for 1 minute the analogy that Professor King began a few minutes ago around *Brown v. Board of Education*, because, indeed, I think your questions suggest, to me at least, that you think perhaps we are being overly rigid in what we are expecting.

While I do not think anybody is asking, certainly we are not, that someone come here and prejudge a particular fact situation before it is presented in a courtroom, we are saying that there are some fundamental principles about which a nominee must assure us in its application, or that person is not worthy of confirmation.

For instance, could a nominee in 1991 come before this committee and assert that they believed that States sanctioned separation or apartheid if you will, it is constitutionally based? I doubt it. I don't think that a nominee could be neutral on the application of those constitutional principles and get confirmed either.

I think there is wide agreement that there are some fundamental rights, and that is really the analogy here. What are the fundamental rights, the application of those constitutional principles that Judge Thomas was unwilling to come forward and assert. And I find that very troubling.

If I take the *Brown* analogy further, he was quite willing, by the way, to criticize *Brown* historically, but say he agreed in the holding. Now, he may have found that right in a clause of the 14th amendment that you and I might not agree with, but he was willing to say that there were constitutional principles—

Senator SPECTER. Ms. Lichtman, I am sorry to interrupt you, but I have just 5 minutes to get to vote, and that is a minimum time. So, the committee will stand in recess for 10 minutes. Thank you.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Thank you for helping me accommodate the Senate schedule here.

Now, who is on first and who is on second? Who has not testified yet?

Ms. GREENBERGER. I would be happy to.

The CHAIRMAN. Ms. Greenberger, if you would, please, we would appreciate it.

#### STATEMENT OF MS. MARCIA GREENBERGER

Ms. GREENBERGER. Thank you, Chairman Biden.

The National Women's Law Center is opposed to the confirmation of Judge Clarence Thomas to the Supreme Court. We do not take this position lightly, and I know that is the case for many of the witnesses who have indicated their opposition.

We oppose Judge Thomas because of our grave concerns that, based on his record, Judge Thomas does not have a commitment to the core constitutional and statutory protections that form the basis for women's legal rights in this country. Instead, Judge Thomas has taken positions that conflict with women's rights under the equal protection clause of the Constitution; the constitutional right to privacy; and women's rights to education and employment secured by Federal law.

You did make reference to the report that the National Women's Law Center prepared, and I will ask that that be made a part of the record.

We looked at his record in that report, and I can now say, unfortunately, that Judge Thomas' testimony before this committee has intensified rather than allayed our concerns.

Judge Thomas has been nominated to fill a crucial seat on the Supreme Court. Last term, five Justices announced their intention to rethink cases decided by narrow margins over spirited dissents. With the changing composition of the Court, cases upon which women's legal rights really could now fit into the category of those ripe for rethinking.

In particular, we fear for women's protection under the equal protection clause of the Constitution. The equal protection clause has been interpreted to give special protection to women against Government-sponsored discrimination. Key cases have given women equal rights to parental support, to be executors of estates, to Social Security benefits for their dependents, for their children, for their spouses, to serve on juries, and to Government employment and education benefits. Until 20 years ago, when the standard changed for measuring sex discrimination under the equal protection clause, no challenge to Government-sponsored sex discrimination was ever successful.

With Justice Marshall's retirement, there are only four members of the Supreme Court who have accepted this heightened protection for women under the Constitution. Justice Rehnquist has consistently opposed providing that protection to women, and the positions of Justices Scalia, Kennedy and Souter are unknown. Therefore, Judge Thomas' views on this issue are of the utmost importance.

Unfortunately, Judge Thomas' record of supporting the application of natural law as reflected in the Declaration of Independence provides little, if any, protection for women. Judge Thomas' testimony at this hearing calling into question how his past statements of natural law apply to deciding cases under the Constitution provide little comfort to those looking for an understanding on his part of the nature of sex discrimination or the way the heightened scrutiny test has actually been used by the courts to eradicate sex discrimination in this country.

His statement, for example, made to Senator Kennedy, and I quote: "I don't think that Professor Sowell or others are in any way sexist or in any way people who would discriminate," demonstrates this lack of understanding. Thomas Sowell has denied the very existence of sex discrimination in employment based on stereotypes of women's abilities and interests. Yet, the heightened scrutiny test must be applied "free of fixed notions concerning the roles and abilities of males and females," and the purpose cannot reflect "archaic and stereotypical notions" about men and women. Whether or not Thomas Sowell thinks he is sexist or means to sanction discrimination, his rationales for women's lower pay and limited job opportunities are precisely the rationales which have no place in the true heightened scrutiny test.

So, too, women's constitutional right to privacy, which includes pregnancy and termination of pregnancy, is at risk. Four Justices

have already applied a standard which, in effect, overturns *Roe v. Wade*, and Justices Souter and O'Connor have each taken positions that are cause for alarm.

At stake is not only the continued vitality of *Roe v. Wade*, but the degree to which States could restrict rights related to abortion, contraception and other privacy rights. The actual contour and scope of the right to privacy could well be determined by the person who takes Justice Marshall's seat. Of great concern is that Judge Thomas has praised legal theories taking the most extreme position on the right to privacy and abortion—theories that could not only overturn *Roe v. Wade*, but require States to criminalize abortion.

His statements at the hearing that he only skimmed, or never even read extreme positions he praised or endorsed, are unavailing. His willingness to discuss other controversial legal doctrines, while refusing to discuss this most critical issue, only heighten the concern. If Judge Thomas is unwilling to speak, the members of this committee must recognize the ominous portent of his silence.

Finally, we have seen the twin pillars of statutory rights central to women—title VII prohibiting sex discrimination in employment and title IX prohibiting sex discrimination in education—endangered by increasingly restrictive Supreme Court interpretations.

From May 1981 to May 1982, Clarence Thomas was head of the Office for Civil Rights, the office that enforces title IX. For 8 years he then served as Chairman of the Equal Employment Opportunities Commission, which enforces title VII. During these years, Judge Thomas ignored court orders, refused to enforce Supreme Court decisions, and was criticized repeatedly by Congress because of his poor enforcement record.

The National Women's Law Center was counsel for the sex discrimination plaintiffs in the *WEAL* and *Adams* cases, the cases in which a Federal judge expressed his frustration and concern with Clarence Thomas, as head of the Office for Civil Rights, for not complying with the court order designed to get enforcement moving again.

We saw Judge Thomas limit the scope of title IX and the other antidiscrimination laws—even to the point of being criticized by Brad Reynolds, who was then Assistant Attorney General for Civil Rights at the Justice Department. And we saw Judge Thomas cut back seriously on the employment rights of women, minorities, and the elderly at the EEOC. Again, Judge Thomas' attempts at the hearing to minimize the significance of the court order against him and to dismiss the devastating impact on people across the country of the policies he adopted are unconvincing.

Judge Thomas said that he enforced the law vigorously when individual victims of intentional discrimination were harmed. But his record proves otherwise. For example, Judge Thomas tolerated employer policies intentionally barring women of child-bearing years from jobs, and reduced EEOC efforts to protect women suffering intentional pay discrimination.

As Chairman of EEOC, Judge Thomas went so far as to criticize one of EEOC's own major sex discrimination cases, the *Sears* case, which sought to open higher paying jobs to women—to the point where Sears, in defending the case, tried to call then Chairman

Thomas as a witness on its behalf. The ABA Model Code of Professional Responsibility bars even a junior EEOC lawyer on the case from making those kinds of public statements.

Judge Thomas assured this committee that he would not justify discrimination, nor he said, "would I shy away from it." But his is a record of shying away from discrimination, of closing his eyes, and turning his back on victims of discrimination who sought the help of the Government agencies he ran, and of embracing and praising individuals who would undo the major gains women have won under the law in the last 20 years.

Thank you.

[The report follows:]

**JUDGE CLARENCE THOMAS:**  
A RECORD LACKING IN SUPPORT OF WOMEN'S LEGAL RIGHTS

A REPORT BY THE  
**NATIONAL WOMEN'S LAW CENTER**

AUGUST 20, 1991

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**Judge Clarence Thomas: A Record Lacking in Support of Women's Rights****EXECUTIVE SUMMARY****What is at stake**

The Supreme Court has shifted radically in recent years. In June, Chief Justice Rehnquist, in an opinion joined by Justices O'Connor, Scalia, Kennedy, and Souter, announced the Court's intention to rethink cases decided by narrow margins over "spirited dissents." The Court may be poised to reverse decisions protecting women's rights, including:

- **The constitutional right to equal protection of the laws**, which ensures that any government policy that discriminates based on sex must be substantially related to an important governmental objective not based on stereotypes about gender roles. Only four Justices are known to support this type of analysis, known as "heightened scrutiny," for sex-discrimination; others may hold such laws to a weaker standard.
  
- **The constitutional right to privacy**, which includes marriage, contraception, pregnancy, and abortion. At least four sitting Justices oppose constitutional protection for the right to privacy.
  
- **Broad interpretations of statutes barring sex discrimination**, including Title IX, relating to education, and Title VII, relating to employment. In recent years, increasingly conservative majorities have narrowed these statutes, leaving increasing numbers of women who experience discrimination without remedy.

Because of the growing activism of the Court, the next Justice's views regarding each of these key protections for women are critical.

**Judge Thomas's views: Equal Protection**

Judge Thomas's articulated views and record are antithetical to the continued viability of the heightened scrutiny standard of protection against sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.

- Judge Thomas's view that the Constitution should be interpreted as the founders originally intended freezes the Constitution at the time of its drafting — a time when women were second-class citizens, could not vote, and were subjugated to their fathers and husbands.
  
- The original intent of the Founders, according to Judge Thomas, is to be found in the Declaration of Independence, which in turn is based on "Natural Law" principles. Natural Law principles found their most consistent application in a century of Equal Protection cases decided before 1971. In these cases, "women's natural roles" as wife and mother were considered reason enough to deny women important benefits and opportunities.
  
- Judge Thomas proposes to make the Privileges or Immunities Clause the "core of the Fourteenth Amendment." This provision of the Constitution has never provided protection against sex discrimination, is a discredited source of individual rights, and is inadequate as a substitute for the Equal Protection Clause.

- In fact, Judge Thomas has made statements that indicate that he is skeptical that sex discrimination in employment exists. Rather, he has stated that women choose lower-paying jobs of their own accord. He has also praised the theories of Thomas Sowell, who writes that women do not experience the type of discrimination that should be prohibited by law.

#### Judge Thomas's views: Privacy

Judge Thomas's record indicates that he is hostile to the Ninth Amendment fundamental right to privacy and that he would interpret the Constitution to protect life, defined to begin at conception.

- Judge Thomas has described the Court's interpretation of the Constitution to include a right to privacy through the Ninth Amendment as an "invention." He has specifically criticized the analysis of both Griswold v. Connecticut, which upheld married couples' right to use birth control, and Roe v. Wade, which protects women's right to abortion.

- The right to privacy criticized by Judge Thomas also protects the right to marry and divorce, and to have children. If no right to privacy exists, a legislature may place onerous restrictions on these intensely private matters.

- In fact, Judge Thomas has written that "allowing, restricting, or . . . requiring abortions are all matters for a legislature to decide." He sees no role for the Court in protecting women's right to privacy.

- Judge Thomas's theories of Natural Law, however, do support a right to life for the fetus. In praising Lewis Lehrman's article that argues that the Constitution and the Declaration

of Independence must be read together to guarantee a fetus's right to life, Judge Thomas indicated that Lehrman's was "a splendid example applying natural law." The logical end of Lehrman's and Judge Thomas's theory is that all abortions must be banned.

**Judge Thomas's views: Discrimination in Education**

Judge Thomas's overall record as Assistant Secretary for the Office for Civil Rights (OCR) of the Department of Education was characterized by a concerted effort to minimize enforcement of Title IX and other anti-discrimination laws, even where intentional discrimination against individuals was involved.

- Judge Thomas defied a federal court order designed to secure enforcement of Title IX and other civil rights laws.
  
- During Judge Thomas's tenure, OCR sought to exclude most cases of employment discrimination from the scope of Title IX. The Supreme Court eventually reversed the OCR position, but in the meantime, complaints of employment discrimination in violation of Title IX were not processed.
  
- Judge Thomas instituted policies that reduced remedies to victims of educational discrimination, including those who had been intentionally denied benefits based on their sex. During Judge Thomas's tenure, OCR implemented policies that called on educational institutions to assess and monitor their own compliance with civil rights laws, at the expense of individual victims of discrimination.

- Judge Thomas's OCR challenged Title IX's protection against nonintentional, but pervasive discrimination against girls and women. Although proof of an intent to discriminate was not required by the courts in order to establish a violation of Title IX, OCR required such a standard, particularly in athletics cases.

**Judge Thomas's views: Employment Discrimination**

As chair of the Equal Employment Opportunity Commission (EEOC), Judge Thomas presided over efforts to cut back on enforcement and limit the scope of anti-discrimination laws. These policies limited relief even for individual victims of intentional discrimination.

- Judge Thomas's EEOC tolerated employer policies intentionally barring women of child-bearing age from jobs. Under Judge Thomas, the EEOC took the position that these so-called fetal protection policies would be permitted as long as they were implemented for a legitimate business reason and failed to process complaints for several years. The Supreme Court subsequently reversed the EEOC position, holding that these policies had to meet the higher "bona fide occupational qualification" standard used for other types of sex-discrimination.
- Judge Thomas's EEOC reduced its efforts to protect women suffering intentional pay discrimination. During his tenure, the EEOC cut back enforcement of Equal Pay Act cases, and refused to process or issue a policy for other types of pay discrimination cases.
- Judge Thomas's EEOC failed to enforce affirmative action approved by the Supreme Court as a remedy for intentional as well as nonintentional discrimination. He forcefully

criticized the Supreme Court's holding that voluntary affirmative action to remedy underrepresentation of women was permissible under Title VII.

- Judge Thomas reduced EEOC's use of class action cases protecting many women from intentional discrimination while doing little to help individual women's cases.
  
- Judge Thomas challenged Title VII's protection against nonintentional, but pervasive discrimination against women. Judge Thomas was openly critical of a case against Sears brought by his agency because it relied on statistics to show discrimination against women employees.

### Conclusion

When looked at as a whole, Judge Thomas's record shows no commitment to core constitutional or statutory protections for women. In fact, his stated views and actions evidence opposition to key protections. President Bush has said that Judge Thomas is the best "man" for the job. His record raises concerns about the basis for that conclusion.

## INTRODUCTION

The Supreme Court has interpreted the Constitution to contain two core principles upon which women's access to the full panoply of rights and opportunities in this country rest. These principles are first, that sex discrimination must be subjected to especially searching scrutiny under the Equal Protection Clause of the Fourteenth Amendment; and second, that there is a fundamental right to privacy, which includes pregnancy and termination of pregnancy. Any nominee to the Supreme Court who does not fully support these two core principles should not be confirmed to the Supreme Court. Further, an individual nominated to the Supreme Court who has displayed hostility to the statutes designed to protect women from sex discrimination lacks an essential commitment to equal justice and should not be confirmed.

The next Justice's respect for core constitutional principles and existing precedents upholding both constitutional and statutory rights is of even greater significance given the increasing activism of the Court's conservative wing. Last term, Chief Justice Rehnquist made clear the Court's intention to review existing precedents, particularly those decided or reaffirmed by narrow margins over "spirited dissents."<sup>1</sup> Justice Marshall, in one of his last dissenting opinions, warned that the Court, due to the change in "personnel," had sent "a clear signal that scores of established constitutional liberties are now ripe for reconsideration." Justice Marshall included a list of sixteen "endangered precedents," including

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<sup>1</sup> See Payne v. Tennessee, 59 U.S.L.W. 4814, 4819 (1991). The Court in Payne upheld the use of victim impact evidence in capital cases, overturning two recent Supreme Court decisions that had barred such evidence. Chief Justice Rehnquist's majority opinion contended that the Court is not bound by the doctrine of *stare decisis* when cases are unworkable or badly reasoned, particularly in constitutional cases where "correction through legislative action is practically impossible." Payne at 4819, quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (Brandeis, J., dissenting).

Thornburgh v. American College of Obstetricians and Gynecologists (ACOG),<sup>2</sup> which reaffirmed the right to abortion recognized in Roe v. Wade.<sup>3</sup>

The new Justice may indeed provide a fifth vote to overturn existing precedents of critical importance to women. However, when viewed in the context of the Chief Justice's criteria for overturning existing precedents, the seat vacated by Justice Marshall becomes of even greater importance. Larger majorities embolden the Court to issue broader opinions, as the need to narrowly craft a decision to pick up a needed swing vote is eliminated. In areas where the Court has already begun to undermine rights guaranteed by previous Courts, the shift from a 5-4 to 6-3 or even 7-2 majority enables more sweeping decisions of greater durability. There is little doubt that the core constitutional protections for women are among those precedents threatened by the Court's ideological shift and increasing activism.

#### Equal Protection

Until 1971, the Court had never applied the Equal Protection Clause to invalidate a law treating men and women differently. In these earlier cases, the Court would accept any "rational" basis as reason enough to uphold the discriminatory law, including one based on gender stereotypes. Since 1971, however, the Supreme Court has applied more searching or "heightened" scrutiny to government policies that discriminate based on sex. Under the heightened scrutiny standard, a state must demonstrate that an important governmental interest is substantially served by the discriminatory practice. Further, the test must be applied free of fixed or stereotyped notions concerning the roles of males and females.<sup>4</sup> Using heightened scrutiny, the Supreme Court has struck down a wide variety of laws disadvantaging women in many diverse areas of life, including women's right to serve as executors of estates,<sup>5</sup> secure

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<sup>2</sup> 476 U.S. 747 (1986).

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> See *infra*.

<sup>5</sup> See Reed v. Reed, 404 U.S. 71 (1971).

Social Security and other government benefits for their families,<sup>6</sup> be supported by their parents to the same age as their brothers,<sup>7</sup> and manage jointly owned community property with their husbands.<sup>8</sup>

Since the last gender-based equal protection challenge was heard by the Court in 1982,<sup>9</sup> the composition of the Court has changed radically. Only four of the current Justices have used heightened scrutiny to review a sex-discriminatory law. One – Chief Justice Rehnquist – has consistently rejected application of the heightened scrutiny standard to gender discrimination.<sup>10</sup> Judge Thomas, if confirmed, may well provide the fifth vote to return the Court to the days when any reason – even one based on gender stereotypes – was justification enough for government-mandated sex discrimination.

#### Privacy

As Justice Marshall pointed out in his dissent in *Payne*, the right to privacy as it protects reproductive freedoms, is similarly endangered by the Court's recent realignment. Because the right to privacy is "fundamental," the Constitution requires that government demonstrate a "compelling" state interest in order to justify its restriction.<sup>11</sup> The landmark decision in *Roe v. Wade*, extended the right to privacy guaranteed by the Ninth Amendment to termination of pregnancy, assuring that the privacy right's basic protections are fully available to women, as they are to men.<sup>12</sup> *Roe* followed a half-

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<sup>6</sup> See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

<sup>7</sup> See *Stanton v. Stanton*, 421 U.S. 7 (1975).

<sup>8</sup> See *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

<sup>9</sup> See *Mississippi Univ. for Women (MUW) v. Hogan*, 458 U.S. 717 (1982).

<sup>10</sup> See *infra*.

<sup>11</sup> See *infra*.

<sup>12</sup> 410 U.S. 113 (1973).

century-old line of cases, including Griswold v. Connecticut, which held that the privacy right includes the right of married couples to use contraception.<sup>13</sup>

In recent years, however, women's right to privacy has been seriously undermined, with the Court upholding state and federal laws that severely limit women's access to abortion. Webster v. Reproductive Health Services,<sup>14</sup> called into question whether a majority of the Supreme Court will interpret the fundamental right to privacy to apply to abortion, certain forms of contraception, and by this questioning, to pregnancy itself. In Webster, a 5-4 majority upheld a Missouri law declaring that life begins at conception and placing onerous restrictions on abortion, including a prohibition on the use of public facilities to perform abortions. Last term, again by a 5-4 majority, the Court relied on Webster to hold in Rust v. Sullivan that family planning program regulations prohibiting health care personnel in federally funded clinics from providing any information about abortion-related services did not violate women's right to abortion or doctors' right to freedom of speech.<sup>15</sup> Webster put four Justices -- Rehnquist, White, Kennedy, and Scalia -- on record as no longer applying strict scrutiny when the privacy right to contraception and abortion is implicated. In providing the fifth vote in Rust, Justice Souter aligned himself with the conservative attempt to render the privacy "right unenforceable, even against flagrant attempts by government to circumvent it."<sup>16</sup> The right to privacy, including abortion, now hangs by a fraying thread -- Justice Souter or Justice O'Connor, or the new Justice may provide the fifth vote to end constitutional protection for reproductive rights.

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<sup>13</sup> 381 U.S. 479 (1965).

<sup>14</sup> 109 S.Ct. 3040 (1989).

<sup>15</sup> 59 U.S.L.W. 4451 (U.S. May 23, 1991).

<sup>16</sup> 59 U.S.L.W. at 4464 (Blackmun, J., dissenting).

### Statutory Rights

The twin pillars of statutory rights central to women are Title VII, prohibiting discrimination in employment, and Title IX, prohibiting discrimination in education. Each of these statutes contains broad-based protections, the contours of which have been interpreted by landmark Supreme Court cases over the years. For example, in the area of education, the Court has interpreted Title IX, to bar schools' employment discrimination on the basis of gender,<sup>17</sup> and to allow for a private right of action so that individuals who experience discrimination covered by the statute may seek redress through the courts.<sup>18</sup> In the area of employment, the Court has held that the Title VII prohibitions on sex discrimination encompass sexual harassment,<sup>19</sup> and policies that discriminate against women based on their parental status<sup>20</sup> and child-bearing capacities.<sup>21</sup> As the statutes were silent in each of these important areas, the Court's broad reading of prohibited discrimination has made a significant difference to millions of women in education institutions and in the workplace.

In recent years, several key decisions have restricted the reach of Title VII, making it harder for women and others who experience employment discrimination to prevail. For example, Ward's Cove Packing Co. v. Antonio made it more difficult to win "disparate impact" discrimination cases in which an apparently neutral employment practice, such as a height or weight restriction, actually discriminates against women or minorities.<sup>22</sup> In Price Waterhouse v. Hopkins, the Court held that if an employer makes a hiring, firing or promotion decision based on both discriminatory and nondiscriminatory factors,

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<sup>17</sup> See North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

<sup>18</sup> See Cannon v. University of Chicago, 441 U.S. 677 (1979).

<sup>19</sup> See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

<sup>20</sup> See Phillips v. Martin Marietta, 400 U.S. 542 (1971).

<sup>21</sup> See United Auto Workers v. Johnson Controls, 111 S.Ct.1196 (1991).

<sup>22</sup> 490 U.S. 642 (1989).

the employer will not be guilty of violating Title VII if he or she can show the same decision would have been made in the absence of intentional discrimination.<sup>23</sup> Last term, in EEOC v. Arabian American Oil Co., the Court held that Title VII does not apply to United States employers who employ United States citizens at locations outside the United States.<sup>24</sup>

Next term, the Court will review at least one major issue with respect to Title IX: whether or not individuals may recover compensatory damages for intentional discrimination under Title IX. In September, the Eleventh Circuit determined in Franklin v. Gwinnett County Public that they may not;<sup>25</sup> the Third Circuit in Pfeiffer v. Marion Center Area School District held a month later that such damages are available in the case of intentional sex discrimination.<sup>26</sup> The Court has granted certiorari in the Franklin case;<sup>27</sup> its decision will determine whether women who experience sex discrimination in education will be able to receive compensation for their injuries.

As the Court moves to the right, those who would seek to restrict the scope of and remedies available under Title IX, Title VII, and other anti-discrimination laws have new opportunities to see earlier decisions overruled or limiting new precedent established. At the same time, victims of discrimination are having a harder time using the federal courts to redress their injuries. Given the growing power of those on the Court who would restrict anti-discrimination laws, it is clear that the rights of millions of Americans who experience education or employment discrimination, as well as other forms of bias, may be in grave jeopardy if the new Supreme Court Justice takes a narrow view of statutory civil rights protections.

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<sup>23</sup> 109 S. Ct. 177 (1989).

<sup>24</sup> 59 U.S.L.W. 4225 (U.S. Mar. 26, 1991).

<sup>25</sup> 911 F.2d 617 (11th Cir. Sept. 10, 1990).

<sup>26</sup> 917 F. 2d 779 (3rd Cir. 1990).

<sup>27</sup> 59 U.S.L.W. 3823 (U.S. June 10, 1991) (No. 90-918).

### Judge Thomas's Record

Clearly women have much at stake in the areas of Equal Protection, privacy, and anti-discrimination laws. Judge Thomas's record therefore must be examined to measure his commitment to critical constitutional and statutory rights.

#### Judge Thomas and Equal Protection

Judge Thomas's writings on "Natural Law" give cause for grave concern about his commitment to a 14th Amendment that provides real protection to women. According to Judge Thomas, the Constitution should be interpreted by examining the Declaration of Independence to discern the "original intent" of the Framers. His theory sets him far outside the mainstream of legal thinking in two ways that do not bode well for women. First, despite two centuries of social change, Judge Thomas's reliance on the original intent of the Framers freezes the meaning of the Constitution and its amendments at the time of their drafting. Since neither the Framers nor the drafters of the 14th Amendment were concerned with sex discrimination, a theory of original intent could well read women out of the Equal Protection Clause.<sup>28</sup> Second, and even more extreme, Judge Thomas's view that original intent flows from the Declaration of Independence grounds his constitutional theory in the "laws of nature and nature's God." To him, these "laws set forth immutable principles that existed well before the drafting of the Constitution and will remain ever thus. Under such "laws of nature," women's "God-given" biological differences, rather than their abilities, could become the test for determining the scope of their constitutional protection. Not surprisingly, these Natural Law principles found a consistent application in the century of 14th Amendment decisions upholding blatant sex discrimination prior to 1971.<sup>29</sup> It is therefore deeply disturbing that Judge Thomas's theory of constitutional interpretation may return women to the days when childbearing was reason enough to deny women the benefits and opportunities associated with public life.

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<sup>28</sup> See *infra*.

<sup>29</sup> See *infra*.

### Judge Thomas and Privacy

Natural law poses a similar threat to the fundamental right to privacy. Because it was not explicitly articulated by the Framers, under Judge Thomas's theory no right to privacy would exist. He has referred to the right to privacy under the Ninth Amendment as an "invention," and sharply criticized the decisions, including Griswold v. Connecticut and Roe v. Wade, that apply this right.<sup>30</sup> Of equal concern is the potential that Judge Thomas's theory of natural law would offer constitutional protection for a right to life for the fetus. This theory is spelled out in a 1987 American Spectator article by Lewis Lehrman which Judge Thomas has praised as "a splendid example of applying natural law."<sup>31</sup> Describing Roe v. Wade as a "coup" and resulting legal abortions as a "holocaust," Lehrman's article contends that the Declaration of Independence's statement that all men are endowed with the inalienable right to life and liberty signals the Founding Fathers' intent that 1) the fetus retain an inalienable right to be born; and 2) that the fetus's right is superior to any right to liberty retained by a pregnant woman.<sup>32</sup> Such a theory would not only require the reversal of Roe v. Wade, but could require that all states criminalize abortion. Further, it could support prosecuting women who have abortions -- and the doctors who perform them -- under criminal laws. Given Judge Thomas's favorable commentary about Lehrman's article, we must be seriously concerned for the future of reproductive freedom.

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<sup>30</sup> Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, *ASSESSING THE REAGAN YEARS* 391, 398 (D. Boaz ed. 1988) [hereinafter "Civil Rights"].

<sup>31</sup> Address by Clarence Thomas at The Heritage Foundation, *Why Black Americans Should Look to Conservative Policies*, at 8 (June 18, 1987) [hereinafter "Heritage Foundation"].

<sup>32</sup> Lehrman, *The Declaration of Independence and the Right to Life: One leads unmistakably from the other*, *THE AMERICAN SPECTATOR* 21 (Apr. 1987). Lehrman supports this contention by pointing out that "life" is ahead of "liberty" in the "sequence of God-given rights warranted in the Declaration of Independence and also enumerated first among the basic positive rights to life, liberty, and property" in the Constitution. *Id.* at 23.

### Judge Thomas and Statutory Rights

Judge Thomas's record as an executive branch official charged with enforcing key statutes barring discrimination in education and employment raise similar concerns. As Assistant Secretary for Civil Rights in the Department of Education and Chair of the Equal Employment Opportunity Commission, Judge Thomas presided over efforts to cut back enforcement of and narrow the scope of civil rights laws.<sup>39</sup> He made numerous statements indicative of a personal philosophy unresponsive of broad protections against sex discrimination, and pursued policies consistent with that philosophy. He defied Congress, the federal courts, and even the Justice Department on occasion, in pursuing policies inconsistent with the law. Whether the discrimination at issue was raised through a class-action or individual suit, and whether the case involved a disparate impact or intentional discrimination claim, Clarence Thomas too often proved to be no friend to plaintiffs seeking to redress their statutory rights.

### Conclusion

Given the current Court's activist position regarding reversal of longstanding precedent, and the narrow margins by which core constitutional protections for women are now supported on the Court, Judge Thomas's views regarding constitutional interpretation raise deep concerns about the continued viability of these protections. In the case of equal protection, he has articulated legal theories and approaches in his writings that are antithetical to the application of the heightened scrutiny test to sex discrimination as we know it today. Similarly, Judge Thomas has criticized the key decisions upholding the right to privacy as applied to abortion and articulated legal theories and approaches which not only deny that such a right exists, but support a right to life for the fetus. Furthermore, Judge Thomas's record of limiting the scope and enforcement of civil rights laws

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<sup>39</sup> See *infra*.

suggests that he will join the conservative wing of the Court in narrowing statutory protections for women and others against discrimination.

This report elaborates on Judge Thomas's record in each of these key areas affecting women's rights: equal protection; privacy; and statutory protections against sex discrimination in education and employment. Clearly other aspects of Judge Thomas's experience also raise important concerns, including his legal qualifications, hostility to Congress, and lack of support for the rights of minorities, older Americans, and the disabled. This report is intended to add to the picture of Judge Thomas's record an analysis of his work and theories in distinct areas most critical to women. The portrait that emerges is one that has profound consequences for the future of legal rights and protections in this nation.

**I. JUDGE THOMAS'S VIEWS REGARDING CONSTITUTIONAL INTERPRETATION ARE INCONSISTENT WITH PROTECTIONS FOR WOMEN UNDER THE FOURTEENTH AMENDMENT.**

Judge Clarence Thomas's articulated views and record are antithetical to critically important constitutional protections women have gained over the past twenty years. Judge Thomas's original intent theory, which he grounds in "Natural Law" principles, could undermine the governing Supreme Court precedent that women have heightened protection under the Equal Protection Clause of the Fourteenth Amendment.<sup>24</sup> Furthermore, he threatens to dispense with equal protection analysis altogether by relying on the now disfavored Privileges or Immunities Clause, which has never afforded any protection to women, as the preferable constitutional source of equality analysis.<sup>25</sup>

**A. With the Current Composition of the Court, Women are in Danger of Losing Heightened Scrutiny Protection under the Equal Protection Clause of the Constitution.**

Prior to 1971, no constitutionally based sex discrimination case had ever been won before the Supreme Court. Cases brought under the Equal Protection Clause of the Fourteenth Amendment failed because a "rational basis" test was applied, giving the government virtually unlimited leeway to treat men and women differently. For example, the Court upheld various state statutes that prevented women from working beyond a certain number of hours, prohibited women from

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<sup>24</sup> See generally Thomas, *Toward a Plain Reading of the Constitution - The Declaration of Independence in Constitutional Interpretation*, 30 *How. L.J.* 691, 701-02 (1987) [hereinafter "Constitutional Interpretation"]; Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 *HARV. J.L. & PUB. POL'Y* 63 (1989) (hereinafter "Privileges or Immunities").

<sup>25</sup> In his writing, Judge Thomas criticizes the Brown v. Board of Education, 347 U.S. 483 (1954), decision for not adopting Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), and thus failing to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment. See *Privileges or Immunities, supra*, at 68.

bartending unless their fathers or husbands owned the bars, and deterred women from serving on juries.<sup>36</sup>

Commencing with Reed v. Reed, the Supreme Court abandoned the rational basis analysis and adopted what has come to be known as the "heightened scrutiny" test.<sup>37</sup> Under this standard a party seeking to uphold a gender-based classification must show "an exceedingly persuasive justification" for the classification. The burden is met only when the differential treatment is "substantially related" to the achievement of "important governmental objectives." Moreover, the test must be applied "free of fixed notions concerning the roles and abilities of males and females"; the statutory objective cannot reflect "archaic and stereotypical notions" about men and women.<sup>38</sup> This standard has been used repeatedly, since 1971, to overturn discriminatory laws premised on stereotypical assumptions about the roles of men and women. For example, the Court has struck down laws allowing servicemen but not servicewomen to claim spouses as dependents automatically;<sup>39</sup> providing Social Security payments to widows, but not widowers, with children;<sup>40</sup> providing for a higher age of majority for males than females so that males were entitled to parental support for a longer period of time;<sup>41</sup> giving husbands exclusive authority over community property;<sup>42</sup> providing Aid to Families

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<sup>36</sup> Muller v. Oregon, 208 U.S. 412 (1908); Goesaert v. Cleary, 335 U.S. 464 (1948); and Hoyt v. State of Florida, 368 U.S. 57 (1961), discussed *infra*.

<sup>37</sup> Reed v. Reed, 404 U.S. 71 (1971) (departing for the first time from the rational basis standard of review and holding that it was a denial of equal protection for a state automatically to prefer men over similarly situated women in appointing administrators for intestate estates).

<sup>38</sup> Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725-6 (1982).

<sup>39</sup> See Frontiero v. Richardson, 411 U.S. 677 (1973).

<sup>40</sup> See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

<sup>41</sup> See Stanton v. Stanton, 421 U.S. 7 (1975).

<sup>42</sup> See Kirchberg v. Feenstra, 450 U.S. 455 (1981).

with Dependant Children to children with unemployed fathers, but not with unemployed mothers;<sup>43</sup> and granting Social Security survivor's benefits to any widow but only to widowers who had been receiving half of their support from their wives.<sup>44</sup>

With Justice Marshall's retirement, however, only four of the current Justices have a record of applying the heightened scrutiny standard to analyze sex discriminatory policies. For example, Justices Stevens and White joined Justice O'Connor's majority opinion in Mississippi University for Women v. Hogan (MUW), the last sex-based equal protection decision, to strike down a state-supported nursing school policy to limit enrollment to women.<sup>45</sup> Although Justice Blackmun dissented in MUW,<sup>46</sup> he has previously applied the heightened scrutiny test in gender-based equal protection challenges.<sup>47</sup> Chief Justice Rehnquist, on the other hand, has generally been hostile to a heightened scrutiny analysis.<sup>48</sup> Justices Scalia, Kennedy, and Souter have not yet addressed any sex-based equal protection challenge, so their position on the proper standard of review is not known.

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<sup>43</sup> See Califano v. Westcott, 433 U.S. 76 (1979).

<sup>44</sup> See Califano v. Goldfarb, 430 U.S. 199 (1977).

<sup>45</sup> 458 U.S. 717.

<sup>46</sup> Justice Blackmun's dissent in MUW suggests that the Court did not give enough weight to the value of single-sex education, especially in a situation in which other comparable education programs were available to the excluded class.

<sup>47</sup> See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (Blackmun, J., concurring opinion) (invalidating a statute providing for a younger drinking age for women than for men); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidating a statute giving husband exclusive authority over community property); and Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating a statute providing higher age of majority for males than for females so that males were entitled to parental support for a longer period of time).

<sup>48</sup> See, e.g., Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting) (arguing that the gender-based classification need only pass the "rational basis" equal protection analysis); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 742 (1982) (Powell, J., and Rehnquist, J., dissenting) (stating that state's ability to continue single-sex university should be upheld under rational-basis analysis); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting) (arguing that district court opinion, which stated that rational-basis test should have been applied to statute allowing servicemen but not servicewomen to claim spouses as dependents automatically, provided correct analysis).

Continued vitality of the heightened scrutiny analysis for sex-based equal protection challenges is of critical importance for women. In the almost ten years since the Court last applied this test, lower courts have used heightened scrutiny to hold unconstitutional, for example, a law denying citizenship to foreign-born offspring of female, but not male United States citizens;<sup>49</sup> a trial court's decision in a child custody case to look less favorably on a mother's employment outside the home than a father's;<sup>50</sup> and the denial of a promotion to a government employee because she was pregnant and her employer believed she should stay home with her family.<sup>51</sup>

However, recently several lower courts have evaluated government-sanctioned gender discrimination in a deeply troubling fashion. In U.S. v. Commonwealth of Virginia (VMI), a district court held in June of this year that Virginia may continue to exclude women from the taxpayer-supported Virginia Military Institute because the school's unique instructional method contributed to the overall diversity of the Commonwealth's public university system.<sup>52</sup> The court found that this instructional method -- which involves tormenting of first-year students, frequent punishment, lack of privacy, and intentional inducement of stress -- would ultimately have to be abandoned if the school became coeducational because most women would require a "system that provides more nurturing and

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<sup>49</sup> See Elias v. Department of State, 721 F. Supp. 243 (N.D. Ca. 1989).

<sup>50</sup> See Linda R. v. Richard E., 59 U.S.L.W. 2327 (N.Y. App. Div. 2d Dept. Oct. 1, 1990).

<sup>51</sup> See Herrin v. Newton Central Appraisal District, 687 F. Supp. 1072 (E.D. Tex. 1987).

<sup>52</sup> No. 90-0126-R, slip op. (W.D. Va. June 14, 1991). Judge Thomas was asked about the VMI case during his confirmation hearings for the D.C. Circuit Court of Appeals. In response, Judge Thomas stated that it would be inappropriate for him to comment on a case that might come before a circuit court. He did, however, incorrectly identify the case as a possible violation of Title VI of the Civil Rights Act - which bars race discrimination in education -- rather than as a gender-based equal protection challenge. Hearings on the Nomination of Clarence Thomas to the United States Court of Appeals for the District of Columbia Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 56-57 (1990) [hereinafter "Court of Appeals hearings"].

support."<sup>33</sup> The court further noted that the presence of women would distract men from their studies, increase pressures relating to dating, and impair the *esprit de corps* of the institution. The VMI decision provides an opportunity for the Supreme Court to reverse MUW, which held unconstitutional a publicly funded women's nursing school. VMI's reliance on women's inability to adapt to an environment that was not "nurturing" flies in the face of the Court's position in MUW that statutory objectives may not reflect stereotypic views of males and females.<sup>34</sup>

Another recent decision similarly counters constitutional principles established in earlier cases. In United States v. Hamilton, the Fourth Circuit held that the Equal Protection Clause does not prohibit prosecutors from using peremptory challenges to exclude women from criminal juries on the basis of their sex.<sup>35</sup> Although the Supreme Court since 1975 has held that the Sixth Amendment right to a fair trial prevents women from being excluded from a jury based on their gender, and in 1988 held that the Equal Protection Clause bars the use of peremptory challenges to exclude jurors based on race,<sup>36</sup> the Fourth Circuit declined to extend the equal protection analysis to women.<sup>37</sup> As a result, the court upheld the prosecutor's elimination of three Black women from the jury solely because they were women.<sup>38</sup> This case has serious implications for women's right to be free from government-sponsored discrimination, with particularly troubling results for women of color: the fact that sex but not race is an acceptable reason to strike a juror allows prosecutors to limit the

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<sup>33</sup> Slip op. at 15.

<sup>34</sup> 458 U.S. at 723, 725 ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.").

<sup>35</sup> 850 F. 2d 1038 (1988), *cert. denied*, 110 S.Ct. 1109.

<sup>36</sup> See Batson v. Kentucky, 476 U.S. 79 (1986).

<sup>37</sup> The Ninth Circuit reached a contrary result in U.S. v. DeGross, 59 U.S.L.W. 2204 (1990). The conflict in the circuits suggests that this issue may be considered by the Supreme Court in the near future.

<sup>38</sup> 850 F.2d at 1041.

participation of Blacks on the jury by striking Black women, but not white women or Black men.<sup>59</sup>

Given the important role that the Equal Protection Clause has played in ending gender discrimination, the recent decisions of lower courts in VMI and Hamilton are disturbing indeed. With the shift in the make-up of the Court, it is of critical importance that the next Supreme Court justice show commitment to preserve the kind of equal protection analysis that has served women well over the last two decades.

**B. Judge Thomas's View of Constitutional Interpretation is Inconsistent With Heightened Scrutiny of Gender-Based Distinctions under the Equal Protection Clause of the Fourteenth Amendment.**

Judge Thomas's writings on "Natural Law" as the basis for constitutional interpretation raise grave concerns about his commitment to a heightened scrutiny analysis "free of fixed notions concerning the roles and abilities of men and women."<sup>60</sup> If he lacks this commitment, Judge Thomas could well provide the deciding fifth vote to return the Court to the days when preserving women's traditional role in the family was reason enough to deny women the economic, social, and family benefits and opportunities associated with equal status under the law.

Although Judge Thomas claims to "not have a fully developed constitutional philosophy,"<sup>61</sup> he has written numerous articles arguing that the Constitution should be interpreted by examining the Declaration of Independence and other founding documents to discern the "original intent" of the Framers.<sup>62</sup> The Declaration, in turn, embodies moral principles of higher law, or "natural law."<sup>63</sup>

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<sup>59</sup> In Hamilton, the prosecutor declined to strike two white women prior to the time it struck the last two Black women. 850 F. 2d at 1041.

<sup>60</sup> MUW, 458 U.S. 718, 724-25 (1982).

<sup>61</sup> Court of Appeals hearings, *supra*, at 368.

<sup>62</sup> [T]he original intention of the Constitution [is] the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it.

Judge Thomas's theory sets him far outside the mainstream of legal thinking<sup>64</sup> in two ways that present serious dangers to women's equal protection rights.

First, despite two centuries of social change, Judge Thomas's reliance on original intent of the Framers freezes the meaning of the Constitution and its amendments at the time of their drafting. In order to reconcile original intent with the existence of slavery, Judge Thomas argues that the founding documents intended equality for blacks. He states that slavery was "the greatest violation of the fundamental principle of equality, one of the [Founding Fathers'] higher law principles informing the Constitution."<sup>65</sup> To support his thesis, Judge Thomas refers to The Federalist Papers in which the slave trade is described as an "unnatural traffic."<sup>66</sup> In fact, he says, the Founders abhorred the institution of slavery so much that they did not permit the words "slave" or "slavery" to appear in the Constitution.<sup>67</sup> Furthermore, according to Judge Thomas, the "three-fifths" clause, which counted black males as "three-fifths" of a man for taxation and representation purposes, was meant in fact to

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Constitutional Interpretation, *supra*, at 693.

<sup>63</sup> Civil Rights, *supra*, at 400.

<sup>64</sup> See, e.g., J. ELY., DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 50 (1980) ("The idea [of natural law] is a discredited one in our society, however, and for good reason. . . . [Y]ou can invoke natural law to support anything you want. . . . Thus natural law has been summoned in support of all manner of causes in this country -- some worthy, others nefarious -- and often on both sides of the same issue."); Calder v. Bull, 3 Dall. 386, 399 (1798) (Iredell, J., dissenting) ("[T]he Court cannot pronounce [a law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject"); A DICTIONARY OF MODERN LEGAL USAGE (1990) ("Twentieth-century legal scholars have mostly rejected the notion of natural law on positivist grounds, because genuine scientific knowledge cannot validate value judgments, and natural law is composed entirely of value judgments. The modern user of this term should be aware of the debate surrounding the concept it denotes, and of the generally low regard in which the concept is now held.").

<sup>65</sup> Privileges or Immunities, *supra*, at 64.

<sup>66</sup> Constitutional Interpretation, *supra*, at 695.

<sup>67</sup> Constitutional Interpretation, *supra*, at 696.

weaken the power of the slave states by reducing the number of people who could be counted for representation in the House of Representatives.<sup>68</sup>

Through this reasoning, Judge Thomas extends his concept of the Founding principles of equality to include Blacks. But he has said nothing about how, if at all, these founding principles apply to women. That women would be included in the Founders' principles of equality is improbable, as it is well established that neither the Framers of the Constitution nor the drafters of the Fourteenth Amendment were concerned at all with sex discrimination.<sup>69</sup> The theory of original intent effectively reads women out of the Constitution, and inevitably leads to a return to the use of the rational basis test, instead of heightened scrutiny, in sex-based equal protection challenges. This rational basis standard offers virtually no protection to women.

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<sup>68</sup> Constitutional Interpretation, *supra*, at 696.

<sup>69</sup> In fact, the first time that gender was mentioned in the Constitution, the right to vote was specifically reserved for men.

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV §2 (1868).

Second, Judge Thomas grounds his constitutional theory in the "laws of nature and nature's God."<sup>70</sup> To him, these "laws" set forth immutable principles that "transcend[] and underl[y] time and place, race and custom."<sup>71</sup> Thomas's views of natural law include a strong religious emphasis. He refers to equality as a God-given right<sup>72</sup> and to the rights of life, liberty, and property as "given to man by his Creator."<sup>73</sup> He quotes John Quincy Adams in explaining natural law:

Our political way of life is by the laws of nature [and] of nature's God, and of course presupposes the existence of God, the moral rule of the universe . . . .<sup>74</sup>

According to Judge Thomas, natural law principles are the basis of the Declaration of Independence and other founding documents. They should form the basis for constitutional interpretation because the original intention of the Constitution is "the fulfillment of the ideals of the Declaration of Independence as Lincoln, Frederick Douglass, and the Founders understood it."<sup>75</sup>

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<sup>70</sup> Civil Rights, *supra*, at 400.

<sup>71</sup> Heritage Foundation, *supra*, at 8.

<sup>72</sup> *Id.* at 9.

<sup>73</sup> Privileges or Immunities, *supra*, at 68.

<sup>74</sup> Heritage Foundation, *supra*, at 9.

<sup>75</sup> Constitutional Interpretation, *supra*, at 693.

The implications of using the "laws of nature" as the basis for constitutional interpretation are troubling. In an equal protection challenge, a court might well find that women's biological function of childbearing is sufficient to justify unequal treatment of women.

Our concern over the adverse implications of a Natural Law theory for women's constitutional rights is based squarely in the history of the Court's analysis of the Fourteenth Amendment. Reliance on the "laws of nature and of God" in American jurisprudence has been used explicitly to justify gender-based discrimination. Archaic and stereotypical notions about women's roles, grounded in women's "different" nature were applied to justify discriminatory treatment in a century of gender-based Fourteenth Amendment challenges decided prior to 1971. Natural law has meant that men and women are relegated to separate spheres and allocated and denied rights depending on gender.

The case of *Bradwell v. Illinois*,<sup>76</sup> clearly illustrates the result of "natural rights" reasoning. The Supreme Court upheld an Illinois statute that prohibited women from obtaining licenses to practice law.<sup>77</sup> In his concurring opinion, Justice Bradley stated that "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and women. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."<sup>78</sup> Furthermore, "[t]he paramount destiny and

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<sup>76</sup> 83 U.S. 130 (1873).

<sup>77</sup> In denying Myra Bradwell's license to practice law, the Illinois Supreme Court stated:

That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth ... In view of these facts, we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.

83 U.S. at 132.

<sup>78</sup> 83 U.S. at 141.

mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."<sup>79</sup>

Using a similar analysis, the Court in Muller v. Oregon,<sup>80</sup> upheld an Oregon statute that limited the number of hours women can work, by ruling that inherent differences between the sexes provide ample justification for the state to limit a women's liberty right to contract. The Court held that:

[T]he sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.<sup>81</sup>

In Goesaert v. Cleary,<sup>82</sup> the Court again limited women's work opportunities by upholding a Michigan statute that prohibited all women, except for wives or daughters of male bar owners, from

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<sup>79</sup> 83 U.S. at 141.

<sup>80</sup> 208 U.S. 412 (1908).

<sup>81</sup> 208 U.S. at 423. See also, Riley v. Massachusetts, 232 U.S. 671 (1913) (state statute limiting the number of hours women can work in any mechanical or manufacturing establishment does not violate the liberty of contract assured by the Fourteenth Amendment); Miller v. Wilson, 236 U.S. 373 (1914) (forbidding the employment of women in certain establishments for more than eight hours per day or forty hours per week is a reasonable exertion of the state's protective authority and does not infringe upon the freedom to contract under the Fourteenth Amendment of the Constitution); Bosley v. McLaughlin, 236 U.S. 385 (1914) (state statute limiting the hours that women can work in hospitals does not deny women their freedom to contract as guaranteed under the Fourteenth Amendment); see also, Quong Wing v. Kirkendall, 223 U.S. 59 (1912) (upholding a state statute which exempted women from paying a license tax for hand laundry work). The Court stated that Montana can "put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former." Thus the Court found that the state can not only reward women who pursue traditionally acceptable work, but also punish those men who do "women's work." 223 U.S. at 63..

<sup>82</sup> 335 U.S. 464 (1948).

working as bartenders. The Court stated that Michigan can, in fact, prohibit all women from working as bar maids, since the state has an interest in preventing "moral and social problems" which may be caused by bartending by women.

Even where a basic responsibility of citizenship, rather than a job opportunity, was at stake, the Court did not hesitate to accept traditional gender roles as a sufficient reason to justify discriminatory treatment. As recently as 1961, the Court, in Hoyt v. Florida,<sup>43</sup> upheld a Florida statute that automatically exempted women from jury duty, unless the individual women affirmatively registered for such duty. Not surprisingly, this law commonly resulted in all-male juries.<sup>44</sup> The State of Florida justified the law by arguing that "[e]ver since the dawn of time," the rearing of children has been the prime responsibility of women, and breadwinning the responsibility of men.<sup>45</sup> Because women were the center of home and family life, the State, acting in pursuit of the general welfare, could relieve women from the civic duty of jury service, unless the individual woman determines that such service is "consistent with her own special responsibilities."<sup>46</sup>

Because Natural Law principles have provided the underpinnings of the historic legal analysis that kept women from full and equal participation in public life, it is important to know how Judge Thomas reads the Fourteenth Amendment's application to sex discrimination. His scholarly writings

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<sup>43</sup> 368 U.S. 57 (1961).

<sup>44</sup> The Hoyt case was brought by a Gwendolyn Hoyt, who had been convicted by an all-male jury of murdering her husband. Although the Court failed to find systematic exclusion of women from juries, statistics presented at the evidentiary hearing and in the briefs indicated that at the time Ms. Hoyt was tried, 10 women and 9,990 men were on the jury list from which the venire would be drawn. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 102 (1975).

<sup>45</sup> Brief for Appellee at 11, quoted in B. BABCOCK, *supra*, at 101-2.

<sup>46</sup> 368 U.S. at 62. In 1975, Hoyt was effectively reversed by Taylor v. Louisiana, in which the Court held that the elimination of women from jury panels violates the fair cross section requirement of the Sixth Amendment and prevents a fair trial. 419 U.S. 522 (1975).

on the Constitution do not specifically address the issue. However, his statements during his tenure as a top executive branch official charged with enforcing our nation's civil rights laws underscore the serious concerns raised by his support of Natural Law. For example, Judge Thomas has discounted the role of sex discrimination in the concentration of women in low-paying jobs. He instead attributes women's disproportionate presence in certain poorly paid jobs and their absence in better, higher-paying jobs to women's own preferences -- that "women choose to have babies" rather than obtaining higher education and that "cultural differences" between men and women explain hiring differentials.<sup>87</sup> These types of statements suggest a lack of understanding of discriminatory factors which have historically kept women out of many higher paying jobs and reflect stereotypical notions of the roles and abilities of women.<sup>88</sup>

Judge Thomas's stated views mirror those of his self-proclaimed "intellectual mentor," Thomas Sowell.<sup>89</sup> Sowell in his many books on issues of race and politics has contended that "Political activists may analogize the situation of women to that of minorities and attribute economic

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<sup>87</sup> It could be, Thomas says, that blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks choose not to study chemical engineering and that women choose to have babies instead of going to medical school.

Williams, *A Question of Fairness*, ATLANTIC MONTHLY 71, 79 (Feb. 1987).

In talking about the disparities in hiring figures in the *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), Judge Thomas is reported to have said that:

[They] could be due to cultural differences between men and women, educational levels, commuting patterns, and other "previous events."

*Id.* at 81.

<sup>88</sup> Judge Thomas has praised Justice Scalia's dissent in *Johnson v. Santa Clara County*, 480 U.S. 616 (1987), which argues that women are not employed in road maintenance crews not because of discrimination, but because "it has not been regarded by women themselves as desirable work." 480 U.S. at 668 (emphasis in original). See Speech by Clarence Thomas to the Cato Institute 20-22 (Apr. 23, 1987).

<sup>89</sup> Kauffman, *Freedom Now II: Interview with Clarence Thomas*, REASON 28, 30 (Nov. 1987).

disparities to forces more sinister than domestic lifestyles but their reiterated vehemence is not evidence."<sup>90</sup> Sowell elaborates on this statement in the chapter, "The Special Case of Women," in his book *Civil Rights: Rhetoric or Reality?* This chapter, which Judge Thomas has described as "a much needed antidote to cliches about women's earnings and professional status,"<sup>91</sup> concludes that there is no evidence that "employer bias and 'stereotypes'" cause economic disparities.<sup>92</sup> Rather, women are attracted to the lower-paying jobs "that make sense to women."<sup>93</sup> Because these jobs are so appealing to women, they "are likely to have their pay held down by the competition of many applicants."<sup>94</sup> Sowell contends that women are underrepresented in fields such as engineering, research, law, and sports, not because of sex bias in those fields, but because the emphasis in such jobs on "continuous full-time work," make them unappealing to women.<sup>95</sup> Sowell fails to acknowledge the fact that women, including those who are married or have children, indeed choose jobs in engineering, research, law, and sports. Further, Sowell does not explain why within many specific job categories, holding education and experience levels constant, women still earn less than men.<sup>96</sup> Although he recognizes that employers may find a woman with family responsibilities to be

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<sup>90</sup> T. SOWELL, *PREFERENTIAL POLITICS*, 17 (1990); see also T. SOWELL, *KNOWLEDGE & DECISIONS* 260 (1980).

<sup>91</sup> Thomas, *Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom*, *LINCOLN REVIEW* 15 (Winter 1988) [hereinafter "LINCOLN REVIEW"].

<sup>92</sup> T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* 107 (1984).

<sup>93</sup> *Id.* at 107.

<sup>94</sup> *Id.* at 108.

<sup>95</sup> *Id.* at 95.

<sup>96</sup> NATIONAL COMMISSION ON WORKING WOMEN OF WIDER OPPORTUNITIES FOR WOMEN, *WOMEN AND WORK* 3 (1990).

"less valuable as an employee or less promotable," he does not consider this to be discrimination.<sup>97</sup> Finally, he declines to accept that Black women experience dual discrimination based on sex and race. Instead, he asserts incorrectly that Black women do better in the workforce than both Black men and white women, a fact which he believes "is a very serious embarrassment to the civil rights vision."<sup>98</sup>

Based on Thomas Sowell's arguments, Judge Thomas concludes that "women cannot be understood as though they were a racial minority group, or any kind of minority at all."<sup>99</sup> These comments, coupled with the general absence of discussions of the problems of discrimination against women,<sup>100</sup> are particularly disturbing given Judge Thomas's position as a top official, both at the Office for Civil Rights in the Department of Education and at the Equal Employment Opportunity Commission, charged with enforcing equality laws.

The omission is even more blatant given that Judge Thomas's considerable writings explaining how his original intent theory does include equality for racial minorities, even though the Founders allowed the practice of slavery to continue proposed theories that have no application to women.<sup>101</sup>

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<sup>97</sup> T. Sowell, *supra* at 97-8.

<sup>98</sup> [B]lack women have fared better, relative to their white counterparts, than have black men relative to white men. . . . Even when black and white women in general hold the same job currently, black women average more continuous experience. . . . Indeed, the ability of black women to overtake white women in the marketplace is a very serious embarrassment to the civil rights vision.

*Id.* at 101-2.

<sup>99</sup> LINCOLN REVIEW at 15 - 16 (emphasis in original).

<sup>100</sup> Judge Thomas's speeches to women's groups and labor organizations have highlighted sex discrimination cases undertaken by the EEOC during his tenure. See, e.g., Speech by Clarence Thomas to the National Women's Law Center, New York, New York (June 17, 1983); Speech by Clarence Thomas to the AFL-CIO Civil Rights Institute, Silver Spring, Maryland (Apr. 3, 1984). However, women are conspicuously absent in his writings on the Constitution or otherwise.

<sup>101</sup> [The Founders] did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the

Judge Thomas's arguments with respect to racial equality are not transferable to equality between the sexes, as they are based on the history of slavery and its abolition. With respect to women, principles of Natural Law as embodied in the founding documents have been exclusionary. If it is true that Judge Thomas does not read the founding documents to intend equality for women as he contends they did for Blacks, women may indeed lose the core protections guaranteeing their equality if he is confirmed.

C. Judge Thomas's Reliance on the Discredited Privileges or Immunities Clause is Inconsistent with Continued Use of the Equal Protection Clause to Protect Against Government-Sanctioned Sex Discrimination.

Judge Thomas relies on the Privileges or Immunities Clause as the preferable constitutional source of protection against discrimination.<sup>102</sup> Specifically, he contends that in Brown v. Board of Education,<sup>103</sup> the Court erred in relying on social science data, instead of following the analysis in Justice Harlan's dissent in Plessy v. Ferguson,<sup>104</sup> which relied on the Privileges or Immunities Clause.<sup>105</sup> This analysis has serious adverse implications for women's rights. First, Judge Thomas

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right, so that enforcement of it might follow as fast as circumstances should permit. (emphasis in original) (quoting Abraham Lincoln)

LINCOLN REVIEW, *supra*, at 8.

<sup>102</sup> Judge Thomas discusses the Brown case as a missed "opportunity to revive the Privileges and Immunities Clause as the core of the Fourteenth Amendment." Privileges or Immunities, *supra*, at 68.

<sup>103</sup> 347 U.S. 483 (1954).

<sup>104</sup> 163 U.S. 537 (1896).

<sup>105</sup> Brown v. Board of Education would have had the strength of the American political tradition behind it if it had relied upon Justice Harlan's arguments instead of relying on dubious social science.

Privileges or Immunities, *supra*, at 68; *see also id.* at 66-7; Constitutional Interpretation, *supra*, at 698-99, 701-03.

would suggest replacing equal protection doctrine -- which has been critical in protecting women's rights -- with the Privileges or Immunities Clause, which has been discredited as a source of protected individual rights.<sup>106</sup> The Privileges or Immunities Clause was given very limited application by the Slaughter-House Case.<sup>107</sup> It is limited to those matters which are derived from national as opposed to state citizenship and has been construed to extend only to a limited set of rights including those to carry on interstate commerce, to travel from state to state, to petition Congress, to vote for national offices, to enter public lands, to be protected while in custody of the United States marshals, to inform United States authorities of violations of their laws, and to take and hold real property.<sup>108</sup> All of these rights are already protected by other portions of the Constitution, thus rendering the Privileges or Immunities Clause a redundant and empty provision.<sup>109</sup>

Second, based precisely on the Natural Law reasoning that Judge Thomas embraces, the Privileges or Immunities Clause has historically been construed to offer no protection for women's rights -- a matter Judge Thomas neither acknowledges nor addresses. A prime example of this problem is the Bradwell case, discussed earlier.<sup>110</sup> In upholding a statute denying women a license to practice law, the Court ruled that the Fourteenth Amendment did not grant Bradwell the right to bar admission in the state of Illinois, since admission to a state bar is not a privilege or immunity of United States citizenship. Justice Bradley, in his concurring opinion, emphasized that the Privileges

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<sup>106</sup> "[The Privileges or Immunities Clause] has to all intents and purposes been dead for a hundred years." J. ELY, *DEMOCRACY AND DISTRUST*, 22 (1980).

<sup>107</sup> 16 Wall 36 (1873) (holding that laws enacted by the Louisiana legislature establishing a slaughter-house monopoly did not violate the Fourteenth Amendment's Privileges or Immunities Clause); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 418-24 (1988).

<sup>108</sup> See Crutcher v. Kentucky, 141 U.S. 47 (1891); Twining v. New Jersey, 211 U.S. 78 (1908); and Oyama v. California, 332 U.S. 633 (1948); see also L. TRIBE, *supra*, at 423.

<sup>109</sup> L. TRIBE, *supra*, at 423-24.

<sup>110</sup> 83 U.S. 130 (1873).

or Immunities Clause did not grant women as citizens the right to engage in any and "every profession, occupation, or employment in civil life." Since the right to practice law is a privilege granted by the states to its citizens, the state has the authority to determine who is and is not qualified for the profession. The state in this case determined that women were not qualified to practice law, given women's particular "delicate nature" and role in society as wife and mother.

A further limitation in the Privileges or Immunities Clause is evident within Justice Harlan's dissent in Plessy, upon which Judge Thomas relies. Justice Harlan envisioned the Privileges or Immunities Clause to provide for a "color-blind" constitution, even though the "white race" is the "dominant race" and "will continue to be for all time, if it remains true to its great heritage."<sup>111</sup> He contended that proper application of the Privileges or Immunities Clause would correct such anomalies as the fact that it is a violation of the law "If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling."<sup>112</sup> Judge Thomas attempts to deal with these problematic aspects of the dissent by arguing that Justice Harlan meant that the superiority of the white race is dependent upon its accepting that it is not superior but equal and that the Constitution is color-blind.<sup>113</sup> The limits of this approach, however, are apparent, as a color-blind Constitution in the context of a society struggling with racism is a limited tool.

Further, Justice Harlan's dissent refers to Chinese immigrants as being from "a race so different from [the white race] that we do not permit those belonging to it to become citizens of the United States."<sup>114</sup> Judge Thomas attempts to deal with this glaring flaw by arguing that under

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<sup>111</sup> 163 U.S. at 559.

<sup>112</sup> 163 U.S. at 553.

<sup>113</sup> Constitutional Interpretation, *supra*, at 701.

<sup>114</sup> 163 U.S. at 561.

Justice Harlan's principles, the "Chinese and anyone who undertook the duties of citizenship could become citizens [and thus entitled to equality]," since citizenship requires both rights and duties.<sup>115</sup> Yet Justice Harlan explicitly excluded Chinese immigrants from the possibility of ever becoming citizens. This analysis presents a stark contrast to the more expansive equal protection analysis which extends to all persons and is not limited to citizens.

Taken as a whole, Judge Thomas's views regarding natural law and the primacy of the Privileges or Immunities Clause suggest that women have reason to be concerned. As a lower court judge, Judge Thomas was duty-bound to follow Supreme Court precedent applying heightened scrutiny to gender-based challenges under the Equal Protection Clause. As a Supreme Court Justice, he may have the opportunity to reverse precedent in this critical area. Judge Thomas's theory of constitutional interpretation undermines the Equal Protection Clause for women, as it is logically incompatible with applying heightened scrutiny under the Equal Protection Clause in gender discrimination cases. Even if heightened scrutiny is applied, Judge Thomas's support for Natural Law principles means that adherence to the traditional roles of women may be reason enough to justify unequal treatment of women. The Privileges or Immunities Clause, which has historically been used to deny women opportunities and which Judge Thomas proposes to revive "as the core of the Fourteenth Amendment,"<sup>116</sup> offers a poor alternative to the Equal Protection Clause, which since 1971 has offered women substantial protection against government-sanctioned discrimination. For these reasons, Judge Thomas's record is inconsistent with the core constitutional protection against unequal treatment of men and women by federal, state, and local government.

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<sup>115</sup> *Constitutional Interpretation, supra*, at 702.

<sup>116</sup> *Privileges or Immunities, supra*, at 68.

## II. JUDGE THOMAS HAS FAILED TO DEMONSTRATE A COMMITMENT TO THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY THAT APPLIES TO PREGNANCY AND TERMINATION OF PREGNANCY

The long line of cases recognizing a constitutionally protected fundamental right to privacy stands for the clear proposition that decisions affecting marriage, childbirth, reproductive rights and family relationships are so fundamental and critical to self-determination that governmental interference must survive "strict scrutiny" judicial review. Under strict scrutiny, the government must demonstrate a compelling interest justifying its interference and that the interest is furthered by means which are the least restrictive on fundamental rights.<sup>117</sup> The Supreme Court's application of the right to privacy to pregnancy and termination of pregnancy, including contraception, assures that its basic protections are fully available to women, as they are to men. Any nominee to the Supreme Court must have a commitment to these core constitutional protections for women guaranteed by the fundamental right to privacy.

### A. The Constitutional Right To Privacy That Includes Contraception, Abortion and Pregnancy is Threatened.

In a line of decisions stretching back more than half a century, the Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, exists under the Constitution. Decisions recognizing a fundamental privacy interest have forbidden governmental intrusion into marriage;<sup>118</sup> procreation;<sup>119</sup> family relationships;<sup>120</sup> and child rearing and education.<sup>121</sup>

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<sup>117</sup> See Roe v. Wade, 410 U.S. 113, 155 (1973).

<sup>118</sup> Loving v. Virginia, 388 U.S. 1, 12 (1967).

<sup>119</sup> Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

<sup>120</sup> Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

<sup>121</sup> Meyers v. Nebraska, 262 U.S. 390, 399 (1923).

The leading modern case first recognizing the constitutional right to privacy in reproductive decisions is Griswold v. Connecticut,<sup>122</sup> in which the Court considered the constitutionality of a Connecticut law prohibiting the sale or use of contraceptives, even by married couples. The Griswold Court held that a right to privacy is found in the "penumbras" of the First, Third, Fourth, and Fifth Amendments and protected by the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>123</sup> Finding that the Connecticut law implicated the right to privacy, and that the state lacked a compelling interest in the statute, the Court held the law to be invalid. In Eisenstadt v. Baird,<sup>124</sup> the Court extended the right to contraception to unmarried persons and defined a constitutional right to privacy broad enough to include "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>125</sup>

Against this backdrop, the Court issued its decisions in Roe v. Wade<sup>126</sup> and Doe v. Bolton.<sup>127</sup> In opinions written by Justice Blackmun, the Court recognized that a woman's fundamental right to privacy includes the right to abortion, and thus any governmental interference with that right would be subjected to strict scrutiny. Under Roe, until the time a fetus is viable, in the beginning of the third trimester, the only state interest compelling enough to justify regulation of abortion is protection of the woman's health. The state's interest in fetal life only becomes a

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<sup>122</sup> 381 U.S. 479 (1965).

<sup>123</sup> Quoted in 381 U.S. at 484.

<sup>124</sup> 405 U.S. 438 (1972).

<sup>125</sup> 405 U.S. at 453 (emphasis in original).

<sup>126</sup> 410 U.S. 113 (1973).

<sup>127</sup> 410 U.S. 179 (1973).

sufficiently compelling justification to interfere with a woman's fundamental right when the fetus is viable.

The application of the right to privacy to contraception, abortion, and pregnancy assures that its basic protections are available to women as well as men. However, women's right to privacy based on their unique reproductive capacity is under serious threat.

After Griswold and Roe were decided, the Supreme Court repeatedly struck down state laws which infringed on women's privacy rights. For instance, the Court invalidated laws prohibiting the sale of contraceptives to minors and limiting their distribution to licensed pharmacists;<sup>128</sup> laws restricting the availability of unemployment benefits for pregnant women;<sup>129</sup> laws requiring that married women obtain their husbands' consent to have an abortion;<sup>130</sup> and laws requiring physicians to convey intimidating information designed to dissuade women from having abortions.<sup>131</sup>

However, with the changing composition of the Supreme Court, the assault on women's privacy rights – and especially the strict scrutiny of governmental interference in contraception and abortion, including minors' access to abortion – has intensified.

The Supreme Court's decision in Webster v. Reproductive Health Services<sup>132</sup> was an unprecedented retreat from the long line of cases recognizing that contraception and abortion are included in the fundamental right to privacy, and thus any governmental interference with these rights must be subjected to strict scrutiny. The Missouri law at issue in Webster began with a preamble, which stated the legislature's "findings" that a human being's life begins at conception, defined as the

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<sup>128</sup> Carey v. Population Services International, 431 U.S. 678 (1977).

<sup>129</sup> Turner v. Department of Employment Services, 423 U.S. 44 (1975).

<sup>130</sup> Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

<sup>131</sup> Thornburgh v. American College of Obstetrics and Gynecologists (ACOG), 476 U.S. 747 (1986).

<sup>132</sup> 109 S.Ct. 3040 (1989).

time of fertilization, and that "unborn children" have protectable interests in life, health and well-being. The preamble further directed that the laws of Missouri be interpreted to assure that "unborn children" have the same rights as all other persons in the state, within the limits imposed by the United States and Missouri Constitutions.

Chief Justice Rehnquist wrote for five justices in upholding the preamble, construing it as merely expressing the state's value judgment favoring childbirth over abortion. Since the preamble by itself did not restrict the activities of the plaintiffs, these justices decided that only when Missouri uses the preamble to restrict an individual's actions would the Court determine whether the particular restriction was constitutional.

The four dissenting justices held that an assault on the fundamental privacy right to contraception and abortion was inherent in the preamble. According to the dissent, the preamble's definition of life as beginning at conception and conception as occurring at the time of fertilization unconstitutionally interferes with a woman's right to abortion and to use methods of contraception that can prevent implantation of the fertilized ovum, including the IUD, the "morning-after" pill, low-dosage oral contraceptives, and the French-produced drug RU-486.<sup>133</sup>

The preamble to the Missouri law at issue in Webster was enacted as part of a comprehensive law placing onerous restrictions on abortion, including a prohibition on the use of employees or public facilities (broadly defined) to perform abortions; a requirement of specific viability tests for abortions at twenty weeks of pregnancy; and a prohibition on the use of public funds for abortion counseling. In addition to the preamble, the Court upheld the prohibition on public funding and the viability testing requirement.<sup>134</sup>

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<sup>133</sup> 109 S.Ct. at 3068, n.1, 3081 (Stevens, J., dissenting).

<sup>134</sup> The prohibition on the use of public funds for abortion counseling was dismissed as moot and the Court did not rule on its constitutional validity.

Chief Justice Rehnquist's opinion on these provisions -- joined by Justices White and Kennedy -- did not explicitly overrule Roe, but undermined its foundation by concluding that the viability testing requirement is "reasonably designed to ensure that abortions are not performed where the fetus is viable -- an end which all concede is legitimate -- and that is sufficient to sustain its constitutionality."<sup>155</sup> This language suggests the plurality is applying rational basis review, the standard applied to rights granted only minimal constitutional protection, not fundamental rights like the right to privacy. Moreover, the plurality also concluded that there was no reason that the state's interest in protecting fetal life should come into existence only at the point of viability, referring to a "compelling interest" in protecting potential human life throughout pregnancy, from the moment of conception. Under this analysis, even if the rights to abortion and contraception remain in name fundamental rights, strict scrutiny is satisfied by the state's compelling interest in potential life from the very beginning of pregnancy, and thus any governmental interference with the rights could be upheld. Justice Scalia's separate opinion recognized that the plurality's analysis covertly overruled Roe and denounced the failure to repudiate Roe completely and explicitly. Thus, there are at least four Justices<sup>156</sup> no longer applying the strict scrutiny protection of the rights to contraception and abortion included in the fundamental right to privacy.<sup>157</sup>

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<sup>155</sup> 109 S.Ct. at 3058.

<sup>156</sup> Although dissenting from the plurality's analysis in Webster, in previous cases Justice O'Connor has supported the authority of states to enact restrictions which do not impose an "undue burden" on the right to choose, a less rigorous standard than strict scrutiny review. See, e.g., Thornburgh v. ACOG, 476 U.S. at 828 (O'Connor, J., dissenting).

<sup>157</sup> Two 1990 Supreme Court decisions upholding rigid parental notification laws, Hodgson v. Minnesota, 110 S.Ct. 2926 (1990) and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990), demonstrate that young women's abortion rights have already been severely eroded.

Last term, the Court continued its assault on Roe v. Wade in Rust v. Sullivan,<sup>138</sup> with Justice Souter joining the four Justices who had abandoned strict scrutiny protection for abortion rights in Webster. In Rust, a five-member majority upheld regulations prohibiting health care personnel at federally funded family planning clinics from providing information on any abortion-related services, even in response to direct inquiries by women. Despite the fact that the statute implicated not only the right to privacy, but also the first amendment, the Court found that the government's regulations were constitutionally permissible because the "Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected."<sup>139</sup> Justice Blackmun, however, found that the Rust majority had gone beyond previous decisions, such as Webster, which limited the availability of abortion, and had reached a level of coercion that violated women's right to choose: "Roe v. Wade . . . and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination."<sup>140</sup> He concluded that Rust v. Sullivan resembles Webster, in that it technically leaves the fundamental right protected by Roe v. Wade intact, while robbing it of substance. He called the decision "nearly as noxious as overruling Roe directly, for if a right is found to be unenforceable . . . then it ceases to be a right at all."<sup>141</sup>

The next appointee to the Supreme Court may well provide the fifth or sixth vote to end constitutional protection of women's fundamental right to privacy, including the rights to contraception and abortion. In the wake of Webster, numerous states have enacted laws that could provide the basis for a full reversal of Roe v. Wade.

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<sup>138</sup> 59 U.S.L.W. 4451 (U.S. May 23, 1991).

<sup>139</sup> 59 U.S.L.W. at 4459.

<sup>140</sup> 59 U.S.L.W. at 4463 (Blackmun, J., dissenting).

<sup>141</sup> 59 U.S.L.W. at 4464 (Blackmun, J., dissenting).

A recently enacted Louisiana law, for example, outlaws abortion except in very narrowly defined cases of rape, incest, or to save the woman's life. The Louisiana law carries with it a penalty of a fine of \$100,000 and imprisonment for up to 10 years for any doctor who performs an abortion. Although the law was struck down by a federal district court judge, the state is seeking an expedited review of the case by the Supreme Court. Both Guam and Utah have enacted similar laws, which could also be used to overturn Roe.<sup>142</sup>

A Pennsylvania statute, held unconstitutional by the federal district court, imposes a 24-hour waiting period for abortions, requires spousal notification, "informed consent" by both a minor seeking an abortion and a parent, and mandatory counseling by a physician.<sup>143</sup> The district court observed that several of these provisions are essentially the same as those struck down in Thornburgh in 1986 and rejected the state's argument that the constitutional standard had been modified by Webster and other recent decisions. The Pennsylvania statute, therefore, also presents a clear opportunity for the Court to undermine Thornburgh and the decision upon which Thornburgh was based -- Roe v. Wade -- and to continue the Court's pattern of chipping away at the right to privacy until it ceases to exist.

As the Court moves toward returning the rights of women to the days of back-alley abortions and prohibitions on contraceptives, there is no more important inquiry than where the nominee stands on the fundamental right to privacy.

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<sup>142</sup> The Guam law, which was recently suspended by a federal court, prohibits abortions except when two physicians determine that continuing the pregnancy would endanger the woman's life or gravely harm her health. Unlike the Louisiana law, it carries a penalty against the woman. The Utah statute allows abortion only if the woman's life or health is gravely endangered or if the fetus has significant defects. A federal district court is expected to rule on its constitutionality in the near future.

<sup>143</sup> 59 U.S.L.W. 2160 (E.D. Pa. Sept. 18, 1990).

**B. Judge Thomas's Record Indicates That He is Hostile to the Fundamental Right To Privacy and Supports an Interpretation of the Constitution That Includes the Principle that Life Begins At Conception.**

Judge Thomas has criticized the key constitutional decisions that establish the right to privacy. Finding the line of cases based on the Ninth Amendment to be constitutionally flawed as inconsistent with the intent of the Framers, Judge Thomas argues that Natural Law principles are the appropriate basis for interpreting the scope of unenumerated constitutional rights. These Natural Law theories, discussed in the previous section, are not only inconsistent with a right to privacy that includes termination of pregnancy, but could read into the Constitution the principle that life begins at conception.

In his writings on Natural Law, Judge Thomas criticizes the line of cases upholding the right to privacy based on the Ninth Amendment. In his article "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," Judge Thomas argues against "the willfulness of both run-amok majorities and run-amok judges" in favor of limited government based on the "higher law political philosophy of the Founding Fathers."<sup>144</sup> A self-proclaimed conservative,<sup>145</sup> Judge Thomas notes that the "current case provoking the most protest from conservatives" is *Roe v. Wade*.<sup>146</sup> He cites both *Roe* and *Griswold v. Connecticut*, which struck down a statute barring married couples from using birth control, as examples of activist judicial use of the Ninth Amendment in violation of higher law principles.<sup>147</sup>

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<sup>144</sup> Privileges or Immunities, *supra*, at 63 - 64.

<sup>145</sup> See Heritage Foundation, *supra* (describing Judge Thomas's experiences as a conservative Black in the Reagan Administration).

<sup>146</sup> Privileges or Immunities, *supra*, at 63 n.2.

<sup>147</sup> *Id.*

Judge Thomas explained his "misgivings" about Roe, Griswold, and other privacy cases in "Civil Rights as a Principle Versus Civil Rights as an Interest." This article criticizes Justice Arthur Goldberg's "discovery, or rather invention," of the Ninth Amendment in Griswold.<sup>148</sup> Justice Goldberg's often-cited concurring opinion in Griswold elaborated upon Justice Douglas's majority opinion, which held that the right to privacy is found in the "penumbras" of specific rights contained within the Bill of Rights and given force through the Ninth Amendment.<sup>149</sup> Justice Goldberg's concurrence suggests that although the "right to privacy" is not explicitly stated within the Constitution, it exists as a fundamental personal right, found in the "'traditions and [collective] conscience of our people,'" and applied through the Ninth Amendment. According to the Goldberg concurrence, just as the Government could not impose a "totalitarian limitation of family size,"<sup>150</sup> the government cannot outlaw voluntary birth control by married persons, absent a showing of a compelling subordinating state interest.

Judge Thomas, however, regards the Ninth Amendment as "an additional weapon for the enemies of freedom."<sup>151</sup> If the Court can find the right to privacy in the Constitution, Judge Thomas argues, might the Court not also find a right to welfare, for example? The desire to protect rights "simply plays into the hands of those who advocate a total state," because rights read into the Constitution by Congress or the Court will be enforced through "the expansion of bureaucratic government."<sup>152</sup> In short, Judge Thomas makes the extreme argument that the rights of people must be limited in order to stop the growth of government.

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<sup>148</sup> Civil Rights, *supra*, at 398.

<sup>149</sup> 381 U.S. at 487.

<sup>150</sup> 381 U.S. at 497.

<sup>151</sup> Civil Rights, *supra*, at 399.

<sup>152</sup> *Id.*

The right to privacy expressed in Griswold and Roe would presumably not find a place within Judge Thomas's framework of limited government. This framework would place at risk not only women's right to terminate a pregnancy, but also the right not to have an abortion. Judge Thomas has written that "allowing, restricting, or . . . requiring abortions are all matters for a legislature to decide."<sup>153</sup> In Judge Thomas's view, a court may not rely on the Constitutional right to privacy to prevent a legislature from, for example, limiting the number of children a family may have or requiring the sterilization of certain individuals, as long as the state could articulate a rational reason for the policy.

Other manifestations of the right to privacy unrelated to issues of abortion and contraception would also be implicated. For example, the Court in Moore v. City of East Cleveland relied on the Griswold precedent to find strong constitutional protection for the sanctity of the family, and thereby invalidated a local housing ordinance that made it a crime for a woman to share her home with her son and two grandsons.<sup>154</sup> If no privacy right is found in the Constitution, however, a legislature might be able to separate families without running afoul of the Constitution.

Judge Thomas's participation in a 1986 White House Working Group on the Family confirms his hostility toward the Court's interpretation of the Ninth Amendment. The Working Group issued a Report sharply critical of Roe, Griswold, Eisenstadt v. Baird, Planned Parenthood v. Danforth and Moore, describing them as part of a series of cases that "abruptly strip the family of its legal protections and pose the question of whether this most fundamental of American institutions retains any constitutional standing."<sup>155</sup> The Report further pledges that "a fatally flawed line of court

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<sup>153</sup> Thomas, Notes on Original Intent, unpublished paper, at 2 (emphasis in original).

<sup>154</sup> 431 U.S. 494 (1977). The two grandsons were first cousins, one of whom had come to live with the family upon the death of his mother.

<sup>155</sup> A Report to the President from the White House Working Group on the Family, The Family: Preserving America's Future, December 1986 at 11 [hereinafter "Preserving America's Future"].

decisions can be corrected, directly or indirectly, through . . . the appointment of new judges and their confirmation by the Senate, the limitation of the jurisdiction of Federal courts, and, in extreme cases, amendment of the Constitution itself."<sup>156</sup>

While Judge Thomas's writings indicate that he would not construe the Ninth Amendment to provide constitutional protection for a woman's right to terminate a pregnancy, he has made statements indicating that he might find that the fetus has greater rights than it has ever been given. Depending on the grounds, a reversal of Roe v. Wade might nonetheless permit states the option of preserving legal abortion. However, a reversal based on the notion that life begins at conception could go much further, requiring that all abortions throughout the United States be prohibited.

This extreme philosophy is laid out in "The Declaration of Independence and the Right to Life," by Lewis Lehrman, an article that Judge Thomas has described as "a splendid example of applying natural law."<sup>157</sup> Lehrman, like Judge Thomas, contends that the Constitution must be interpreted in a manner consistent with the original intent of the Framers, and that this intent may be found in the Declaration of Independence. Lehrman goes on to interpret the Declaration's statement that all men are endowed by their Creator with the inalienable right to life and liberty as including "a right to life of the child-about-to-be-born (a person)."<sup>158</sup> As "all persons cannot be endowed both with the liberty to take innocent life by abortion and with the inalienable right to life," Lehrman concludes that the Supreme Court overstepped its lawful authority in the Roe v. Wade decision.<sup>159</sup> He bases this argument on his view that the right to abortion is "a spurious right born exclusively of

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<sup>156</sup> *Id.* at 12.

<sup>157</sup> Heritage Foundation, *supra*, at 8.

<sup>158</sup> Lehrman, *The Declaration of Independence and the Right to Life: One leads unmistakably from the other*, *The American Spectator* 21, 22 (April 1987).

<sup>159</sup> *Id.* at 22.

judicial supremacy with not a single trace of lawful authority, implicit or explicit, in the actual text or history of the Constitution itself."<sup>160</sup> He further argues that as the text of the Declaration and the Constitution place "life" sequentially ahead of "liberty," life must be regarded as the more important right:

Is it to be reasonably supposed that the right to liberty is safe if the right to life is not first secured; and, further, is it to be maintained that human life 'endowed by the Creator' commences in the second or third trimester and not at the very beginning of the child-in-the-womb?<sup>161</sup>

For these reasons, Lehrman concludes that Roe v. Wade can only be regarded as a "'coup' against the Constitution," with legal abortions as "the resulting holocaust."<sup>162</sup>

Lehrman's views on the rights of the fetus place more at stake even than the ability of a woman to terminate her pregnancy. As Justice Stevens points out in his dissenting opinion in Webster v. Reproductive Health Services, if life begins at conception "common forms of contraception such as the IUD and the morning-after pill" and even some versions "of the ordinary, daily ingested birth control pill" which prevent implantation of a fertilized egg in the uterine wall would be outlawed.<sup>163</sup> Further, as the majority concluded in Roe, if a fetus is entitled to constitutional rights, a woman who has an abortion must be prosecuted, and, if guilty, given "the maximum penalty for murder."<sup>164</sup>

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<sup>160</sup> Id. at 23.

<sup>161</sup> Id.

<sup>162</sup> Id.

<sup>163</sup> 109 S.Ct. 3040, 3081 & n.7 (1989).

<sup>164</sup> In Roe, the majority discussed inconsistencies between granting Fourteenth Amendment status to a fetus and the typical abortion statute: "It has already been pointed out . . . that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion . . . is significantly less than the maximum penalty for murder . . . . If the fetus is a person, may the penalties be different?" 410 U.S. at 158 n.54.

The logical conclusion of these views – the principle that a fetus possesses a protected constitutional right to life combined with a repudiation of the right to privacy under the Ninth Amendment -- allows for total state control of the most private details of our lives. These theories free the state to impose restrictions that not only affect procreation, but the ability of individuals to marry and live with whom they please, to obtain a divorce, and to make their own decisions regarding other intensely private matters.

**III. IN HIS ROLE AS CHIEF ENFORCER OF CIVIL RIGHTS LAWS PROHIBITING DISCRIMINATION IN EDUCATION AND EMPLOYMENT, JUDGE THOMAS ADOPTED POLICIES THAT SIGNIFICANTLY REDUCED THE SCOPE AND ENFORCEMENT OF THESE LAWS, THEREBY RAISING CONCERNS REGARDING HIS COMMITMENT TO EQUAL JUSTICE.**

Judge Thomas's overall record at the Office for Civil Rights of the Department of Education (OCR) and the Equal Employment Opportunity Commission (EEOC) was characterized by the failure to carry out enforcement responsibilities properly -- even including court-ordered requirements -- as well as increasingly narrow interpretations of substantive key legal protections for women, minorities, the elderly and disabled. There can be no more important rights than those protecting individuals from discrimination in their efforts to seek an education or a job. The rights abridged included discrimination targeted against individuals or large classes of people, discrimination arising from intentional discrimination or discrimination resulting from the adverse impact of a policy or practice, and discrimination stemming from narrowed policy interpretations or seriously inadequate enforcement efforts. Judge Thomas's record of limiting these rights in education and employment, as found by the courts, congressional oversight committees and even the General Accounting Office, warrants serious concern.

**A. As the Chief Official Charged With Enforcing Laws Prohibiting Discrimination in Education, Judge Thomas Presided Over Efforts to Diminish the Effectiveness of Title IX and Other Anti-Discrimination Laws.**

Clarence Thomas took over as Acting Assistant Secretary for Civil Rights of the Department of Education in May, 1981. He was confirmed for this post in July, 1981, and served through May, 1982. In this capacity, he was responsible for the OCR, the office within the Department of Education that is charged with enforcing laws barring discrimination in education. These laws include Title IX of the Education Amendments of 1972, barring sex discrimination in education, Title VI of the Civil Rights Act of 1964, prohibiting discrimination based on race and national origin, the Age

Discrimination Act, protecting victims of age discrimination, and Section 504 of the Rehabilitation Act, which bars discrimination on the basis of disability.

When Judge Thomas arrived at the Department of Education as its chief civil rights enforcer, problems of sex discrimination in schools were serious. The National Advisory Council on Women's Educational Programs issued a report at that time entitled Title IX: The Half Full, Half Empty Glass, documenting widespread sex discrimination in scholarships, athletics, employment, and math, science and vocational education programs faced by girls and women in schools throughout the country<sup>165</sup>.

Despite these serious problems, the Administration was determined to retrench enforcement efforts. Shortly before Judge Thomas's appointment, then-Secretary of Education Terrell Bell wrote to then-Senator Paul Laxalt suggesting his intention to adopt a new approach to civil rights enforcement:

In my opinion, the Title IX regulations need to be modified.... I am still reviewing these and other regulations and plan to take action to cut back as much as I can under the law and under the restraints and demands imposed by the courts.... The Federal Courts may soon be after us for not enforcing civil rights laws and regulations. Your support for my efforts to decrease the undue harassment of schools and colleges would be appreciated. It seems that we have some laws we should not have, and my obligation to enforce them is against my own philosophy.<sup>166</sup>

During his confirmation hearings to be Assistant Secretary, Judge Thomas stated that he indeed intended to enforce civil rights laws "in the least intrusive manner."<sup>167</sup> His record at OCR,

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<sup>165</sup> NATIONAL ADVISORY COUNCIL ON WOMEN'S EDUCATIONAL PROGRAMS, TITLE IX: THE HALF FULL, HALF EMPTY GLASS (1981).

<sup>166</sup> Letter from Secretary Bell to Senator Laxalt (Apr. 24, 1981). The letter is apparently in response to an inquiry from Senator Laxalt regarding OCR enforcement of Title IX in the area of intercollegiate athletics.

<sup>167</sup> Nominations: Hearing before the Senate Committee on Labor and Human Resources on Clarence Thomas of Maryland to be Assistant Secretary for Civil Rights, Department of Education, 97th Cong., 1st Sess., 65 (1981).

when taken as a whole, confirms that he used his role as chief enforcement officer for civil rights in education to create agency enforcement so unintrusive as to be a nonpresence in many key respects. A court found that Judge Thomas, as Assistant Secretary, failed to comply with its order designed to cure nonenforcement through mandatory timeframes and procedures that OCR must follow in handling its complaints and compliance reviews. Moreover, by narrowly construing the controlling law and seriously limiting OCR's enforcement activities in a number of areas, Judge Thomas undermined the ability of those protected by civil rights laws to obtain remedial action. His record at OCR, when taken as a whole, demonstrates a lack of regard both for a court's order and for the underlying rights of women, the disabled, and persons of color that order sought to protect.

1. **Judge Thomas Defied a Court Order Designed to Secure Enforcement of Title IX and the Other Civil Rights Laws Under His Jurisdiction.**

Following a long history of litigation prior to Judge Thomas's tenure at OCR regarding the agency's failure to enforce Title IX, Title VI and Section 504,<sup>148</sup> a court order was entered setting forth detailed timeframes and procedures intended to improve enforcement by requiring OCR to handle complaints and compliance reviews within specified timeframes, thereby eliminating the office's ability to put enforcement on indefinite hold and allow discrimination to continue unchecked.<sup>149</sup> Under Judge Thomas's watch, however, OCR's enforcement efforts slackened, and the clear requirements of the court order were violated.

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<sup>148</sup> The National Women's Law Center represented the plaintiffs in Women's Equity Action League (WEAL) et al. v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990), which was originally brought in 1974 to challenge government nonenforcement of Title IX. Court orders were entered in the case in 1975 and 1977 designed to remedy the nonenforcement. In 1981, the plaintiffs in WEAL filed a motion to show cause why the government should not be held in contempt for its failure to adhere to the terms of the court order. The case was ultimately dismissed in 1990 for lack of standing of the plaintiffs to pursue the claims.

<sup>149</sup> See Court Order, Adams v. Bell, No. 3095-70 and WEAL v. Bell, No. 74-1720 (D.D.C. Dec. 29, 1977).

In March, 1982, the district court judge who entered the order held a hearing to determine whether there was noncompliance, and to decide whether the order should remain in place, or be lifted as requested by the government. In his testimony before the court, then-Assistant Secretary Thomas admitted to violating the time frames:

Q. And you go down to the 12-month average for compliance reviews, you find, do you not, that the time frames were met with respect to compliance reviews only three percent of the time; is that correct?

A. That's right.<sup>170</sup>

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Q. Well, whatever numbers we use, it's pretty clear that most of the time you violate the time frames for compliance reviews?

A. Definitely.<sup>171</sup>

At the conclusion of the hearing, at which Judge Thomas testified extensively, the court found that:

The order has been violated in many important respects and we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court.<sup>172</sup>

Starkly contrasting Judge Thomas to previous OCR Assistant Secretary David Tatel, Judge Pratt observed that whereas under David Tatel, "things were on the way to being improved,"<sup>173</sup> under

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<sup>170</sup> Excerpt of Proceedings, Testimony of Clarence Thomas, March 11, 1982 Adams v. Bell, WEAL v. Bell at 21, (D.C. Cir. 1982).

<sup>171</sup> Id. at 23.

<sup>172</sup> Transcript of Hearing, March 15, 1982 Adams v. Bell, WEAL v. Bell at 0816.

<sup>173</sup> Id. at 0824.

Clarence Thomas's supervision, "we've almost come full cycle."<sup>174</sup> Judge Pratt specifically criticized Judge Thomas's lack of commitment to complying with the court order, stating that OCR's enforcement of the civil rights statutes was being carried out, not as required by the law, but according to Judge Thomas's "own way" and "own schedule."<sup>175</sup> Judge Pratt explained that he regarded the time frames as important to "impress on the people who observe those time frames that after all we've got, first of all, a Constitution; we've got certain acts of Congress, and we've got to pay attention to those things."<sup>176</sup> He stated:

I don't like to hold people in contempt. On the other hand, I'd like to see some kind of manifestation by the people that administer these statutes that they realize they are under the constraints of a court order and accordingly, are going to make a good faith effort to comply.<sup>177</sup>

While Judge Thomas may have sincerely believed that the time frames were not sound policy, he substituted his judgment for that of a court order, demonstrating an alarming disregard for the law. As a result, many individuals who suffered discrimination received no remedy, while federal funds continued to flow to the discriminatory schools.

**2. Judge Thomas's OCR Sought to Limit Employment Discrimination Protections, Even for Individual Employees Suffering Intentional Discrimination, Under Title IX and Section 504.**

Since their promulgation in 1975, Title IX regulations have provided that job discrimination on the basis of sex was covered by Title IX's prohibitions against sex discrimination by education institutions.<sup>178</sup> Although a Supreme Court decision on precisely this point was anticipated within

<sup>174</sup> *Id.* at 0822.

<sup>175</sup> *Id.* at 0822.

<sup>176</sup> *Id.* at 0823.

<sup>177</sup> *Id.* at 0824.

<sup>178</sup> See 34 CFR 106.51-61 (1975). These Title IX regulations were issued when Casper Weinberger was Secretary of Health, Education and Welfare.

the next term, Judge Thomas announced in July of 1981 that the Department was planning a change in rules to exclude employment from the scope of Title IX.<sup>179</sup> Following this announcement, the Department sought permission from the Justice Department to repeal the existing regulations, which would effectively have reversed the government's position in litigation before the Supreme Court urging that employees were protected under Title IX.<sup>180</sup> However, the Justice Department refused, and the Education Department's position on this matter was subsequently repudiated by the Supreme Court. In North Haven Board of Education v. Bell,<sup>181</sup> the Supreme Court held that Title IX covers employment discrimination.

Judge Thomas took a similar position on Section 504, by putting "holds" on Section 504 employment cases. Assistant Attorney General William Bradford Reynolds questioned "the propriety of refusing to process" the Section 504 employment discrimination complaints in areas of the country not affected by contrary judicial orders.<sup>182</sup> He requested that Judge Thomas "direct OCR to begin accepting, investigating and, where appropriate, remedying those complaints."<sup>183</sup> Judge Thomas rejected Reynolds' recommendation, however, and continued the policy of not enforcing the law in

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<sup>179</sup> See UPI Release, July 13, 1981; UPI Release, August 4, 1981. The proposed policy would have protected employees only insofar as the discrimination against them was proved to cause discrimination against students, or if the federal funding was not for general educational purposes, out for the purpose of providing employment.

<sup>180</sup> See BNA DAILY LABOR REPORT, Aug. 5, 1981, at p. A-5 (reprint of letter of July 27, 1981).

<sup>181</sup> 456 U.S. 512 (1982).

<sup>182</sup> Letter to Clarence Thomas from Assistant Attorney General Reynolds (Apr. 9, 1982).

<sup>183</sup> *Id.*

this area.<sup>184</sup> In Consolidated Rail Corp. v. Darrone,<sup>185</sup> the Court held that Section 504 prohibits employment discrimination, again rejecting the narrow position Judge Thomas followed.

3. **Judge Thomas Instituted Policies That Reduced Remedies to Victims of Educational Discrimination, Including Individual Victims of Intentional Discrimination.**

The Early Complaint Resolution (ECR) procedure, implemented during Judge Thomas's tenure at OCR, involved seeking settlements in individual cases before an investigation would be undertaken. In November, 1981, the Justice Department notified OCR of its "major concern" that the ECR procedure does:

not require that the agreements reached between a complainant and recipient meet the legal standards set by Title VI, Title IX, Section 504 and your implementing regulations. The apparent willingness of OCR to accept any agreement which results in a withdrawn complaint, regardless of the substance of that agreement, could lead to a weakening of your enforcement posture and our litigation position.<sup>186</sup>

Judge Thomas, however, declined to alter the procedure, which the House Committee on Government Operations eventually concluded "may be illegal, may not protect the rights of complainants, and may jeopardize future litigation involving violations of civil rights laws."<sup>187</sup>

Also during Judge Thomas's tenure, OCR began a policy of accepting promises of remedial action, rather than actual compliance by the institution accused of violating civil rights laws, as sufficient settlement of cases prior to the issuance of a Letter of Finding. In such cases, the Letter of

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<sup>184</sup> Letter to Reynolds from Clarence Thomas (Apr. 31, 1982).

<sup>185</sup> 465 U.S. 624, 632-33 (1984).

<sup>186</sup> Letter from Stewart B. Oneglia, Civil Rights Division, Department of Justice to Kristine M. Marcy, Office of Civil Rights (Nov. 13, 1981).

<sup>187</sup> House Committee on Government Operations, Investigation of Civil Rights Enforcement by the Office for Civil Rights at the Department of Education, 99th Cong., 1st Sess. 27 (1985).

Finding would indicate that any violation had been corrected.<sup>188</sup> In practice, the institutions' assurances often involved vague or inadequate promises of remedial action; in addition, OCR did little or nothing to monitor whether the institution actually undertook the promised action.<sup>189</sup> The practical effect of this policy was to diminish enforcement of laws protecting the rights of and remedies received by women, minorities, and persons with disabilities in education.<sup>190</sup>

Judge Thomas's exceedingly limited view of federal civil rights enforcement is effectively summarized in an OCR budget document advocating a dramatically diminished federal role in civil rights enforcement. Judge Thomas proposed, among other things:

reviewing the desirability of OCR investigating every complaint over which it has jurisdiction; . . . reviewing the procedure of allowing recipients to assess their own compliance prior to an OCR compliance review; reviewing the procedure of having community groups rather than the Federal government monitor the implementation of remedial plans.<sup>191</sup>

And he concluded, "I can foresee the time when OCR, instead of automatically conducting a compliance review when a serious civil rights violation becomes apparent, would require the institution to conduct a self-assessment of its compliance status."<sup>192</sup>

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<sup>188</sup> Memorandum to Regional Directors from Michael A. Middleton (Oct. 19, 1981).

<sup>189</sup> See Civil Rights Enforcement in the Department of Education: Hearing before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 97th Cong., 2d Sess. 36-38, 63 (1982) [hereinafter "House Education Enforcement Hearings"]; House Committee on Education and Labor, Report on the Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights, U.S. Department of Educ., 100th Cong., 2d Sess. 2, 3, 21 (1988) [hereinafter "House Majority Staff OCR Report"]; CIVIL RIGHTS LEADERSHIP CONFERENCE FUND, AN OATH BETRAYED: THE REAGAN ADMINISTRATION'S CIVIL RIGHTS ENFORCEMENT RECORD IN EDUCATION 25-26 (1983).

<sup>190</sup> House Majority Staff OCR Report, *supra* at 2.

<sup>191</sup> OCR Budget Document 2 (July 29, 1981) (discussing appropriate staff and funding levels for FY 1983) (Assistant Secretary Memorandum). In fact, in justifying its budget request, the purpose stated was to "facilitate getting the Department out from under the scrutiny of the judicial branch [presumably referring to the Adams and WEAL cases] and refocus its enforcement activities to assistance." *Id.* at 7.

<sup>192</sup> OCR Budget Document, *supra*, (Talking Points) at 5.

These suggestions of reliance on community groups and self-assessment to assure compliance with the civil rights laws fly in the face of the very *raison d'être* of federal civil rights enforcement.

4. **Judge Thomas's OCR Challenged Title IX's Protection Against Nonintentional, but Pervasive Discrimination Against Girls and Women.**

Title IX regulations, since their promulgation in 1975, have prohibited practices which are intentionally discriminatory, and those which, although not necessarily by design, have an unfair discriminatory impact against girls and women in education.<sup>193</sup> Title IX protection against practices with discriminatory impact on the basis of sex is of great importance in opening educational opportunities to women young and old.

For example, young women have been hurt by improper uses of SAT tests - which are designed to predict first year college grades. While women's grades are higher than their male colleagues, since 1972 women have scored lower than men in the verbal and math sections of the SAT.<sup>194</sup> When SAT scores are rigidly used, young women can be denied scholarships, admission to schools or educational programs, and a host of other educational benefits. Relying on the Title IX adverse impact regulations, a court recently violated a New York state program for awarding college scholarships to high school students, because it improperly relied on the SAT to the detriment of many deserving young women.<sup>195</sup>

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<sup>193</sup> For example, the regulations addressing admissions, employment, counseling and vocational education covers practices which have an adverse effect based on sex. 34 C.F.R. §106.21(b)(2)(1990); 34 C.F.R. §106.52(1990); 34 C.F.R. §§106.36(b) and (c)(1990); 34 C.F.R. Part 100, App. B, IV, K (1990).

<sup>194</sup> P. ROSSER, *THE SAT GENDER GAP: IDENTIFYING THE CAUSES* 22 (1989).

<sup>195</sup> *Sharif v. New York State Educ. Dept.*, 709 F. Supp. 345 (S.D.N.Y. 1989). Using this unfair system, 60% of its Regents Scholarships and over 70% of its Empire State Scholarships went to young men. 709 F. Supp. at 355.

With Judge Thomas at the helm, OCR began to undercut the Title IX prohibition against adverse impact discrimination. For example, in the area of sex discrimination in athletics, OCR sent a letter of findings that despite the fact that the female athletic program did not give its athletes honors given to the male athletes, there was no violation of Title IX<sup>196</sup> because it was not done for a "sexually discriminatory purpose." In 1982, the National Women's Law Center testified before the House Subcommittee on Civil and Constitutional Rights, expressed its concern about the use of an intent standard, and stated that "[i]t and is not uncommon to read Letters of Findings from OCR which articulate legal standards which are the reverse of those required by the statute and regulations."<sup>197</sup>

The OCR budget document for FY 1983 prepared while Judge Thomas was at OCR, in addition to the changes in enforcement strategies discussed above, also suggests that OCR will be considering "reviewing all policies and regulations for appropriateness" and that "compliance review activities will be targeted exclusively at the comparatively small number of recipients which seem to knowingly and severely violate major civil rights guarantees."<sup>198</sup> The process began while Judge Thomas was at OCR ultimately led to a situation after his departure in which:

"The National Office made it virtually impossible to find a violation of the civil rights laws because the standard of proof required to establish a violation was the stringent "intent" standard, which many regional office staff interviewed believed was not required by the courts."<sup>199</sup>

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<sup>196</sup> August 31, 1981 OCR Letter of Findings, Simms Independent School District.

<sup>197</sup> House Education Enforcement Hearings, *supra* at 31-32.

<sup>198</sup> OCR Budget Document, *supra* at 2, emphasis added

<sup>199</sup> Majority Staff OCR Report, *supra* at 5.

In short, while at OCR, Judge Thomas presided over the beginning of serious cutbacks in the enforcement and interpretation of Title IX and the other statutes prohibiting discrimination in education. This disturbing trend continued over the time he was at the head of the EEOC.

**B. Judge Thomas Undercut the Laws Prohibiting Employment Discrimination as Chair of the Equal Employment Opportunity Commission.**

Judge Thomas's efforts to cut back on enforcement and limit the scope of anti-discrimination laws that began during his short tenure as head of OCR, continued with great force over the eight years he served as Chair of the EEOC. Those years were marked by restrictive EEOC interpretations of employment protections, whether intentional discrimination or practices with discriminatory impact were at stake, whether individuals or large classes of victims of discrimination were injured, and whether the issues were novel or settled.

**I. Judge Thomas's EEOC Tolerated Employer Policies Intentionally Barring Women of Child-Bearing Years From Jobs.**

Just last term, a unanimous Supreme Court held in United Auto Workers v. Johnson Controls, Inc.,<sup>200</sup> that policies that exclude all fertile women from certain jobs, ostensibly to reduce perceived risks to fetal health from exposure to workplace hazards, can be an intentional violation of Title VII. These policies typically prohibit all women between 16 and 50 who are unable to prove their sterility from jobs that, according to the employer, pose reproductive risks. The policies apply only to women, despite the fact that workplace hazards can pose risks to all adult workers, and can cause fetal harm by paternal exposure prior to conception through reproductive or genetic damage.<sup>201</sup> As many as 20 million jobs in the United States expose workers to reproductive or fetal

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<sup>200</sup> 111 S.Ct. 1196 (1991).

<sup>201</sup> House Committee on Education and Labor, A Report on the EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s, 101st Cong., 2nd Sess. 6-7 (April 1990) [hereinafter "House Fetal Protection Report"]. This Report, issued in April of 1990, by the Majority Staff of the Committee, strongly criticizes the Commission for its inaction on this issue during the Judge Thomas' tenure.

health hazards,<sup>203</sup> making the stakes of "fetal protection" policies for women's employment very high. So, too, these policies coerce women into becoming sterilized in order to keep jobs that they desperately need to support themselves and their families.<sup>204</sup> By excluding women as a class from entire job categories, these policies constitute blatant and intentional sex discrimination in employment, and therefore fall squarely within the jurisdiction of the EEOC.

During Judge Thomas's tenure at the EEOC, virtually no women who filed complaints with the EEOC alleging this blatant form of discrimination received any help from the agency in handling their complaints.<sup>205</sup> Until 1988, the EEOC did not develop guidelines for reviewing fetal protection policies, in spite of repeated calls to do so and a mounting number of sex discrimination complaints filed by women over the issue. While the EEOC supposedly followed a "case by case" approach to complaints filed by women who were turned away from jobs as a result of fetal protection policies,<sup>206</sup> in fact EEOC staff were told to forward complaints to the agency's Office of Legal

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<sup>203</sup> *Id.* at 2.

<sup>204</sup> Five female employees of the American Cyanamid Company were irreversibly sterilized by tubal ligations in order to keep jobs requiring exposure to lead after the Company passed a fetal protection policy. One year later, American Cyanamid shut down the plant where the women worked. *Id.* at 5.

<sup>205</sup> *Id.* at 16.

<sup>206</sup> In 1978, the EEOC issued a policy statement indicating its concern about the legality of fetal protection policies that exclude women from jobs based on gender. In 1980, the EEOC issued proposed interpretive guidelines on the issue of employment discrimination and reproductive hazards. After widespread controversy over the proposals, the EEOC withdrew the guidelines with a statement that "the most appropriate method of eliminating employment discrimination in the work place where there is potential exposure to reproductive hazards is through investigation and enforcement of the law on a case by case basis, rather than by the issuance of interpretive guidelines." 46 Fed. Reg. 3916 (Jan. 16, 1981); House Fetal Protection Report, *supra* 37, at 14.

Counsel, which in turn was instructed to do nothing with them. Over 100 of these claims were simply "warehoused."<sup>206</sup>

When EEOC did develop a policy, the approach taken was far less protective of women's employment rights than the position ultimately adopted by the Supreme Court in Johnson. Under Chairman Thomas, the EEOC first took a position as a participant in several important federal court cases addressing the issue. In Wright v. Olin Corporation,<sup>207</sup> the agency argued that Olin's fetal protection policy constituted facial discrimination in express violation of Title VII, but also took the unprecedented position that although none was present in the case, a "legitimate business interest" might justify the policy in some cases.<sup>208</sup> The EEOC position was unprecedented for the only Title VII statutory defense to facial sex discrimination which had ever applied was the far more narrow

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<sup>206</sup> *Id.* at 16. An unsuccessful effort was made to provide guidance to field investigations in the EEOC compliance manual. However, according to the House Fetal Protection Report:

in the final drafting stages, a disclaimer was added to the Compliance Manual Section at the request of EEOC Chairman Clarence Thomas. The disclaimer reflected the EEOC's effort to duck the fetal protection issue: 'The Commission has not yet decided whether such a policy or practice can lead to or be a violation of Title VII, or how the theories of disparate treatment and adverse impact should be applied.' Although this language was not included in the final version, the Chairman's request for such a disclaimer suggests at a minimum that he approved of the EEOC's default on this issue.

Chairman Thomas' desire that the Compliance Manual Section reflect the Commission's neutrality on the fetal protection issue was ultimately satisfied by the deletion of a discussion of how the facial discrimination or disparate impact theories might apply to such policies.

*Id.* at 15.

<sup>207</sup> 697 F.2d 1172 (4th Cir. 1982).

<sup>208</sup> House Fetal Protection Report, *supra* at 20-21.

bona fide occupational qualification ("BFOQ") defense.<sup>209</sup> The Wright court followed the EEOC position. In Hayes v. Shelby Memorial Hospital,<sup>210</sup> the EEOC again urged the court to move from the stringent "BFOQ" defense, and adopt the looser standard it had advanced which was adopted by the court in Wright.<sup>211</sup> The Hayes court agreed to the lower business necessity standard.

In 1988, the EEOC finally issued interpretive guidelines on the applicability of Title VII to fetal protection policies. The 1988 policy guidance adopted the analysis of Wright and Hayes:

[P]olicies which exclude only women constitute per se violations of the Act. Although the BFOQ defense is normally the only available defense in the case of overt discrimination the Commission follows the lead of [Wright and Hayes] that the business necessity defense applies to these cases.<sup>212</sup>

These guidelines are in sharp contrast to the approach taken by the majority in Johnson Controls.<sup>213</sup> In this landmark decision, the Supreme Court repudiated the attempt to weaken Title VII protections for women suffering intentional sex discrimination by soundly rejecting the business necessity defense which was advanced while Clarence Thomas was at the EEOC. The Supreme Court ruled that the statutory language could not admit Judge Thomas's interpretations.

In sum, in an area of vital concern to women, with women's access to millions of jobs at stake, Judge Thomas failed to establish a policy, warehoused cases, and ultimately adopted a policy that directly contradicts the clear statutory language of Title VII as interpreted by the Supreme Court last term. As the House Report noted, in 1990, the EEOC took its most forceful stand up to that

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<sup>209</sup> *Id.* at 21.

<sup>210</sup> 546 F. Supp. 259 (N.D. Ala. 1982).

<sup>211</sup> House Fetal Protection Report, *supra* at 21.

<sup>212</sup> EEOC Policy Guidance on Reproductive and Fetal Hazards, BNA DAILY LABOR REPORT Oct. 5, 1988 at D-1.

<sup>213</sup> 111 S.Ct. 1196 (1991).

point in condemning the lower court decision in Johnson Controls which had upheld the fetal protection policy.<sup>214</sup> This EEOC stand came after Judge Thomas left the agency.

**2. Judge Thomas's EEOC Reduced Its Efforts to Protect Women Suffering Intentional Pay Discrimination.**

The EEOC is responsible for enforcing the two major laws that prohibit discrimination in pay on the basis of sex: the Equal Pay Act of 1963<sup>215</sup> and Title VII of the Civil Rights Act of 1964.<sup>216</sup>

While under the Equal Pay Act, the jobs being compared for purposes of determining whether a pay discrimination exists must be the same or substantially so, the Supreme Court in County of Washington, Oregon v. Gunther held that Title VII also prohibits employers from intentionally segregating even very different jobs according to sex and then depressing the wages of the jobs held predominantly by women.<sup>217</sup> The Court noted, however, that it was not ruling on the issue of "comparable worth," where purposeful pay discrimination was not an issue, but where traditionally "female" jobs paid less than those held by men. The Court left open the question of whether a Title VII violation could apply when women's wage rates were not intentionally reduced on account of sex, but where the lower pay could not be justified on the basis of nondiscriminatory factors such as relative skill, difficulty or importance of the jobs in question.

On May 22, 1984, the House Committee on Government Operations submitted a report entitled Pay Equity: EEOC's Handling of Sex-Based Wage Discrimination Complaints.<sup>218</sup> The Committee made a series of findings extremely critical of EEOC and Judge Thomas as its chair.

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<sup>214</sup> House Fetal Protection Report, *supra* at 29.

<sup>215</sup> 29 U.S.C. § 206(d) et seq (1978).

<sup>216</sup> 42 U.S.C. 2000 et seq.

<sup>217</sup> 42 U.S. 161 (1981).

<sup>218</sup> 98th Cong., 2d Sess. (1984).

First, the Committee found that the EEOC had taken no action on charges and cases of sex-based wage discrimination, other than straight Equal Pay Act cases, since the June 1981 Gunther decision. At the time of the report, EEOC had no policy on handling these types of cases, yet the Commission believed it needed to adopt such a policy before any charges could be processed. The Committee found the need for a policy questionable, since the issue was simply one of implementing the Gunther decision. By its insistence on a policy in this area prior to taking action and then refusing to adopt a policy, the EEOC had denied relief to victims of intentional pay discrimination and failed to provide guidance for the courts and employers.<sup>219</sup>

Second, the Committee determined that there were over 250 sex-based wage discrimination charges, some dating from 1974, languishing in EEOC's Washington office. These claims were all in areas outside the limited Equal Pay Act criteria of identical or substantially similar jobs and therefore were not covered by EEOC policy, but could violate Title VII under Gunther.<sup>220</sup>

Third, the Committee recognized that in May, 1984, the EEOC adopted a Compliance Manual Section on Wage Discrimination, but believed that the adoption came only as a result of the Committee's investigation and hearings and public attention to EEOC's lack of activity in the wage discrimination area. Further, the EEOC hastily formed a task force to examine the more than 250 pending charges, again, according to the Committee, in response to its investigation.<sup>221</sup>

When the EEOC finally began to handle cases, its long-awaited policy simply tracked the specific Gunther ruling, and gave no additional guidance or explication of issues left open by the Court. The EEOC's policy, issued four years after the Gunther decision, merely reiterated the Gunther finding that Title VII does not bar claims of sex-based wage discrimination merely because

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<sup>219</sup> Id. at 3-4.

<sup>220</sup> Id. at 4.

<sup>221</sup> Id. at 4.

the jobs involved are not identical.<sup>222</sup> According to one report, a draft decision had been approved by the four other EEOC commissioners a week before the final June 17, 1985, release of the final policy, but Clarence Thomas wanted a more restrictive position than called for in the draft decision.<sup>223</sup> As a result, the policy was revised to simply restate the Gunther holding, adding no new guidance. Moreover, the EEOC not only refused to consider other types of pay discrimination claims where no intentional discrimination was alleged -- the issue left open in Gunther -- but even refused to investigate the pending charges it had received which did not explicitly allege intentional discrimination to determine if intentional discrimination was present.<sup>224</sup> In sum, then-Commissioner Thomas warehoused over 250 claims for more than three years in order to develop a policy, which once developed, only reiterated Supreme Court case law. Moreover, the ultimate policy adopted interpreted the issue left open by the Supreme Court of Title VII protection for nonintentional pay discrimination adversely to the interests of women.

Moreover, the EEOC's lack of attention to pay discrimination of the type prohibited in Gunther was not accompanied by any increased attention to traditional Equal Pay Act cases. Even straightforward Equal Pay Act claims, where a woman is paid less for virtually the identical job held by a man, did not fare well during Judge Thomas's tenure at the EEOC. In fact, the number of cases brought by the EEOC under the Equal Pay Act during Judge Thomas's tenure dropped noticeably from the number brought in FY 1980, the year before he arrived.<sup>225</sup>

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<sup>222</sup> Equal Employment Opportunity Commission Update: Policies on Pay Equity and Title VII Enforcement: Hearing Before A Subcommittee of the House Comm. on Government Operations, 99th Cong., 1st Sess., 69 (1985) (testimony of Clarence Thomas) [hereinafter "Pay Equity House Hearing"].

<sup>223</sup> Consensus on Comparable Worth Difficult to Find at EEOC, BNA GOVERNMENT EMPLOYEE RELATIONS REPORT, June 17, 1985 at 867.

<sup>224</sup> See Pay Equity House Hearing, *supra*, at 16-20 (testimony of Winn Newman).

<sup>225</sup> WOMEN EMPLOYED INSTITUTE, EEOC ENFORCEMENT STATISTICS (1991).

3. **Judge Thomas's EEOC Failed To Enforce Affirmative Action Approved By The Supreme Court As A Remedy For Intentional As Well As Nonintentional Discrimination.**

During Judge Thomas's tenure at the EEOC, his view on the appropriateness of affirmative action to remedy the effects of discrimination against women and minorities seemed to evolve. He began his tenure articulating some support for such remedies,<sup>226</sup> but moved to consistent, strong and vocal opposition, even to those remedies explicitly approved by the Supreme Court.

The importance of affirmative action to women is highlighted by the Supreme Court case, Johnson v. Santa Clara County.<sup>227</sup> Johnson dealt with an all-too-common situation, the total absence of any women in well-paid, but traditionally male jobs. The job in this case was road dispatcher in Santa Clara County, California. Concerned that it had never employed any women in this position,<sup>228</sup> the County voluntarily reviewed its employment practices. Determining that a female employee of the County for nine years was rated well qualified for the job, the County promoted her to a road dispatcher job over a white male who had a similar rating. The white male, who had scored 75 points to the female candidate's 73 points in an oral interview, sued claiming reverse discrimination.<sup>229</sup> The Supreme Court upheld the County's action as entirely consistent with Title VII.

Judge Thomas forcefully criticized the decision, embracing Justice Scalia's dissent and stating his hope that it would "provide guidance for lower courts and a possible majority in future

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<sup>226</sup> See, e.g., BNA DAILY LABOR REPORT, July 22, 1982.

<sup>227</sup> 480 U.S. 616 (1987).

<sup>228</sup> In fact, of the 238 skilled craft worker positions in the County, none were held by women. 480 U.S. at 621.

<sup>229</sup> 480 U.S. at 624-25.

decisions."<sup>200</sup> Yet, Justice Scalia's opinion was a broadside attack on Title VII Supreme Court case law. Justice O'Connor, in her concurring opinion in Johnson, stated that "Justice Scalia's dissent rejects the Court's precedents and addresses the question of how Title VII should be interpreted as if the Court were writing on a clear slate."<sup>201</sup>

In fact, Judge Thomas has repeatedly criticized Supreme Court precedent, giving rise to serious concern that he, like Justice Scalia whom he has praised, would ignore the principle of stare decisis and disregard or overturn settled Supreme Court cases which have set boundaries for affirmative action under Title VII.<sup>202</sup>

Judge Thomas's aversion to Supreme Court interpretations of Title VII was reflected in his reluctance to enforce the law's mandate as Chair of the EEOC. In 1985, the EEOC acting general counsel, with Judge Thomas's knowledge, ordered EEOC regional attorneys to avoid the use of goals and timetables in any settlements or actions in which EEOC was involved, and to halt enforcement of goals and timetables in any ongoing consent decrees.<sup>203</sup> It was not until his reconfirmation hearings as Chair of the EEOC in 1986 that he promised to withdraw the EEOC ban on the use of goals and

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<sup>200</sup> Speech by Clarence Thomas to the Cato Institute 20-22 (Apr. 23, 1987).

<sup>201</sup> 480 U.S. at 646 (O'Connor, J., concurring).

<sup>202</sup> Judge Thomas has criticized United Steel Workers v. Weber, 443 U.S. 193 (1979) (allowing private employers to engage in voluntary affirmative action); Fullilove v. Klutznick, allowing Congress to remedy past-discrimination by statute). See "Principle Versus Interest" at 395. He also criticized Local 28 Sheet Metal Workers International Association v. EEOC, 478 U.S. 421 (1986) (allowing court-ordered affirmative action to remedy proven discrimination); Firefighters v. Cleveland, 478 U.S. 501 (1986) (allowing affirmative action in consent decrees); and United States v. Paradise, 480 U.S. 149 (1987) (allowing court-ordered affirmative action remedy). Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!* 5 YALE L. AND POL. REV. 402, 407 n.2 (1987).

<sup>203</sup> Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies: Hearing Before the Subcomm. on Employment Opportunities of the House Education and Labor Committee 99th Cong., 2nd Sess., 3-4 (1986); 24 BNA GOVERNMENT EMPLOYEES RELATION REPORT, June 2, 1986, at 764. Judge Thomas misread Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) as justification for this position.

timetables as a remedy.<sup>224</sup> He only did so in recognition of explicit Supreme Court cases decided in 1986 reaffirming the appropriateness of goals and timetables, not because he agreed with the decisions. Rather, Judge Thomas is quoted as saying "That's the law of the land whether I like it or not."<sup>225</sup>

**4. Judge Thomas Reduced EEOC's Use of Class Action Cases Protecting Many Women from Intentional Discrimination While Doing Little to Help Individual Women's Cases.**

As Chair of the EEOC, Judge Thomas made no secret of his strong preference that the EEOC bring cases on behalf of individuals, rather than the more broad-based class action suits that are designed to benefit large numbers of employees. According to the Washington Post:

The Reagan-run EEOC has announced its intention to move away from class-action suits on employment discrimination in favor of smaller, individual suits for persons who can prove that they, specifically, were victims of bias.<sup>226</sup>

Judge Thomas indicated his agreement with this new focus. The New York Times reported that Judge Thomas wanted to move toward a policy of bringing cases where an individual could testify about "what happened to me."<sup>227</sup>

The results of the policy were predictable: the ability of the agency to remedy discrimination against large numbers of women was severely reduced. A good example of the policy's impact is the recent, widely publicized \$66 million settlement on behalf of 13,000 women in a case brought by EEOC in 1978 against Western Electric. The company had a policy forcing pregnant women who

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<sup>224</sup> TIME, Aug. 4, 1986.

<sup>225</sup> Nomination of Clarence Thomas of Missouri to be Chairman of the Equal Employment Opportunity Commission: Hearing Before the Senate Comm. on Labor and Human Resources, 99th Cong. 2d Sess. (1986) (Statement of Clarence Thomas, Chairman, EEOC).

<sup>226</sup> Wash. Post, July 9, 1985.

<sup>227</sup> N.Y. Times, Dec. 3, 1984.

were willing and able to work to take unpaid leave at the end of their sixth or seventh month of pregnancy, then limiting their seniority benefits and offering no guarantee of a job when they sought to return.<sup>238</sup> In abandoning these kinds of class action cases, which remedied intentional discrimination against thousands of women, Judge Thomas's EEOC did not substitute 13,000 individual cases vindicating the rights of these women. In fact, during his tenure at the EEOC, there was only a small increase in the number of individual cases brought, while the number of class action cases dropped substantially.<sup>239</sup> A significant net reduction in EEOC effectiveness resulted.

Moreover, the way in which the EEOC handled individual cases has been faulted. The General Accounting Office (GAO) concluded that the EEOC routinely closed cases without adequate investigations.<sup>240</sup> The bottom line was that the percentage of individuals filing claims of discrimination who got no relief jumped from 28.5% in FY 1980 to 54.2% in FY 1989.<sup>241</sup>

Nowhere is the damage done to individual victims of discrimination more stark than in EEOC's handling of age discrimination cases. During Judge Thomas's tenure, thousands of charges filed by older workers were ignored, and the two-year statute of limitations ran, thereby causing these workers to lose their right to pursue their claims in court. Congress enacted the Age Discrimination Claims Assistance Act to extend the period of time for filing temporarily, so that these cases could be

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<sup>238</sup> N.Y. Times, July 18, 1991.

<sup>239</sup> In FY 1980, the EEOC filed 218 class action cases. In the last year of Judge Thomas' tenure at EEOC, FY 1989, the EEOC filed only 129 such cases. In FY 1980 the EEOC filed 326 cases in total (108 individual) as compared to 486 (357 individual) in FY 1989. WOMEN EMPLOYED INSTITUTE, EEOC ENFORCEMENT STATISTICS (1991). Therefore, the increase in individual cases brought by the EEOC (249) would have a negligible effect as compared to one Western Electric type of case.

<sup>240</sup> GAO reviewed six EEOC district offices and five state agencies during the period January to March, 1987, and concluded that 41% to 82% of the charges closed by the EEOC offices were not fully investigated. GAO, EQUAL EMPLOYMENT OPPORTUNITY: EEOC AND STATE AGENCIES DID NOT FULLY INVESTIGATE DISCRIMINATION CHARGES 3 (1988).

<sup>241</sup> WOMEN EMPLOYED INSTITUTE, EEOC ENFORCEMENT STATISTICS (1991).

brought. Even after the law was passed, however, Judge Thomas's EEOC allowed thousands of additional claims that were filed after the law's effective date to lapse.<sup>242</sup> Judge Thomas's rationale that older workers facing age discrimination still had state law claims fails to address the serious adverse consequences of losing EEOC enforcement and access to the federal courts.<sup>243</sup>

Although the EEOC under Judge Thomas supported the rights of older women workers in several cases involving sex discrimination in retirement benefits,<sup>244</sup> the EEOC also failed to secure benefits to which older workers were entitled. For example, despite an EEOC policy determination that regulations allowing employers to stop paying into employer pension accounts when they reached the age of 65 violated the ADEA, the EEOC did not rescind the regulations.<sup>245</sup> Even cases of intentional facial discrimination against older workers were left unremedied during Judge Thomas's tenure at the EEOC.

5. Judge Thomas Challenged Title VII's Protection Against Nonintentional, but Pervasive Discrimination Against Women.

Twenty years ago, the Supreme Court established in Griggs v. Duke Power Co.,<sup>246</sup> that Title VII prohibits unjustified employment policies that have discriminatory impact against women or minorities, whether intended to have such adverse impact or not. While in 1983 Judge Thomas

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<sup>242</sup> Court of Appeals Hearing, *supra* at 189-90 (1990).

<sup>243</sup> *Id.* at 190-91.

<sup>244</sup> Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983); Spirit v. Teachers Ins. & Annuity Ass'n, 735 F.2d 23 (1984).

<sup>245</sup> Court of Appeals Hearing, *supra* at 185-87.

<sup>246</sup> 401 U.S. 424 (1971).

indicated approval of *Griggs*,<sup>247</sup> his later comments explicitly rejected this seminal Supreme Court decision's basic holding on adverse impact. Judge Thomas said:

We have unfortunately permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories and procedures such as adverse impact . . . We have locked amorphous, complex, and sometimes unexplainable social phenomena into legal theories that sound good to the public, please lawyers, and fit legal precedents, but make no sense. If I have my way, we will have the legal theories conform to reality as opposed to reality being made to conform to legal theories.<sup>248</sup>

This hostility to Title VII protection for practices which may seem fair on their face, but actually adversely affect women or minorities, is reflected in Judge Thomas's criticisms of reliance on statistics which demonstrate such adverse impact. His controversial handling of the *Sears* case<sup>249</sup> demonstrates the difficulties his approach caused in eliminating discrimination against women in the workplace.

The case began in the Nixon Administration with the filing of an EEOC Commissioner's charge in 1973.<sup>250</sup> In 1979, the EEOC filed a lawsuit that included claims that Sears segregated its female employees into low-paying noncommission sales while men were in high-paying commission sales jobs.<sup>251</sup> The segregation of Sears's workforce resulted in a tremendous disparity between the

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<sup>247</sup> Speech by Clarence Thomas to American Society of Personnel Administrators 8-10 (Mar. 17, 1983).

<sup>248</sup> Speech by Clarence Thomas to the Cascade Employers Association 18 (Mar. 13, 1985); *see also* Speech by Clarence Thomas at EEO Law Seminar 18 (May 2, 1985); Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON L. REV. 29, 35-36 (1985).

<sup>249</sup> *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986).

<sup>250</sup> 628 F. Supp. at 1278.

<sup>251</sup> 628 F. Supp. at 1289.

pay scales of its male and female employees, and the purpose of the suit was to open Sears's higher-paying jobs to women.

As Chair of the EEOC, Judge Thomas openly criticized his own agency's case against Sears while it was pending in court. For example, his criticisms were reported in the New York Times:

[Thomas] said the agency had relied too heavily on statistics in investigations initiated by the commission itself and in its review of complaints filed by individuals. For example, he said, a case filed by the commission in 1979 against Sears, Roebuck & Company, still pending in a Federal court, 'relies almost exclusively on statistics' to show discrimination against women.<sup>252</sup>

The Washington Post quoted Thomas as saying, "I've been trying to get out of this [case] since I've been here [at the EEOC]."<sup>253</sup>

Judge Thomas's main criticism of the case was its reliance on statistics. He stated in a congressional hearing that the EEOC had relied too much on statistical disparities:

I, personally, have problems with cases that rely exclusively on statistics.... I did not say that statistics were not useful. In my opinion at least, we should not rely solely on statistics to process cases.<sup>254</sup>

A New York Times article explained that Thomas believes that statistical disparities can often be explained by cultural and educational differences.<sup>255</sup>

The press even reported that EEOC officials hoped to lose the case. The Washington Post reported that "administration officials privately make little secret of their desire to lose the case, and lose it in a way that would explode any chance for future EEOC officials to bring class-action suits on

<sup>252</sup> N.Y. Times, Dec. 3, 1984.

<sup>253</sup> Wash. Post, July 9, 1985.

<sup>254</sup> Hearing Before the Subcomm. of Employment Opportunities of the House Comm. on Education and Labor, 98th Cong., 2d Sess., 11-12 (1984). Judge Thomas also criticized the Sears case for its cost, calling it "an albatross around our neck," GOVERNMENT EMPLOYEE RELATIONS REPORT, June 17, 1985.

<sup>255</sup> N.Y. Times, Dec. 3, 1984.

the basis of statistics."<sup>226</sup> That article quoted an unnamed "high-ranking Justice Department official who has followed the Sears case, but who refused to be quoted publicly," who described the Sears case as "a 'straw man we would like to have beat to death to prevent future class-action cases' by the government."<sup>227</sup> The Nation reported that "Administration officials have made it clear they'd like to lose the case to discourage EEOC officials from bringing similar suits."<sup>228</sup> Another news article reported that "[t]he EEOC under President Reagan was only halfheartedly pursuing the Sears case."<sup>229</sup>

Judge Thomas was widely criticized for his public statements about the Sears case. Judge Thomas was asked by Rep. Augustus F. Hawkins (D.-Calif.), Chairman of the House Subcommittee on Employment Opportunities, during a congressional hearing, "Do you think it is appropriate for you, as Chairman of the Commission, or for the other Commissioners, to be criticizing the Commission's own case while the case is still before the Court?"<sup>230</sup> Judge Thomas responded:

I did not say that the Sears case was not a winnable case or a defensible case. I simply indicated that it was a case that relies exclusively on statistics. I, personally, have problems with cases that rely exclusively on statistics.<sup>261</sup>

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<sup>226</sup> Wash. Post, July 9, 1985.

<sup>227</sup> *Id.*

<sup>228</sup> THE NATION, Sept. 7, 1985.

<sup>229</sup> INDUSTRY WEEK, Feb. 17, 1986.

<sup>230</sup> Oversight Hearings on the EEOC's Enforcement Policies: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 98th Cong., 2d Sess. 11 (1984).

<sup>261</sup> *Id.* If Judge Thomas were considered part of the EEOC legal team, he would have breached his ethical obligations as a lawyer by criticizing the case publicly. Disciplinary Rule 7-107(G) of the ABA Model Code of Professional Responsibility provides:

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation

Sears lawyers were impressed enough with the helpfulness of his statements to their case that they attempted to subpoena him to testify at the trial.<sup>262</sup>

In fact, EEOC did lose the Sears case, and never appealed. The trial judge criticized the agency for not calling any individual witnesses, claimed its statistics were faulty and otherwise asserted that the EEOC failed to present its case adequately.<sup>263</sup> The quoted hopes of some government officials that EEOC lose the Sears case and no longer bring cases affecting such large numbers of women were realized.

### CONCLUSION

Judge Thomas's record includes his actions as chief enforcer of the nation's primary laws prohibiting discrimination in employment and education and a body of speeches, interviews and writings. When looked at as a whole, it is not a record in which a commitment to core constitutional or statutory protections for women emerges. Instead, the overarching constitutional philosophy of national law which Judge Thomas has articulated is at odds with equal protection and privacy rights for women. His actions as head of OCR and EEOC give no comfort that this philosophy will bend to

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from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to: . . . (4) His opinion as to the merits of the claim or defenses of a party, except as required by law or administrative rule. (5) Any other matter reasonably likely to interfere with a fair trial of the action.

Model Code of Professional Responsibility DR 7-107(G), in American Bar Association, (MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT) 38 (1982). The Disciplinary Rules are the most stringent of the provisions in the Model Code. According to the Preliminary Statement, "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* at 1. This rule would prohibit Judge Thomas's statements about the Sears case if held to apply to him, for his statements about the reliance on statistics fall under his "opinion as to the merits of the claim."

<sup>262</sup> BNA DAILY LABOR REPORT, Dec. 7, 1984.

<sup>263</sup> 628 F. Supp. at 1294, 1324, 1352.

accommodate women's legal rights, under the constitution or by statute. President Bush has said that Judge Thomas is the best "man" for the job. His record to date raises concerns about the basis for that conclusion.

The authors of this report are Shirley Sagawa, Lourdes Rivera, Marcia Greenberger and Ellen Vargyas, attorneys at the National Women's Law Center. They wish to thank Donna Sewell Cooper, a second-year law student at the University of Virginia, Amy Jeffress, a third-year student at Yale University and Kate Silbaugh, a third-year law student at the University of Chicago for their assistance in its preparation.



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The CHAIRMAN. Again, you are all going about twice the time to three times the time. I understand, but pretty soon what is going to happen is, just like this cumulative effect upon nominees, there is going to be a cumulative effect upon witnesses.

And, Judith, you are getting the cumulative effect of this panel.

Ms. LICHTMAN. I believe my statement will come in under 5 minutes.

The CHAIRMAN. Thank you very much.

Ms. LICHTMAN. I believe that wholeheartedly.

The CHAIRMAN. All right, I always believe you, so I will believe you believe it.

#### STATEMENT OF JUDITH L. LICHTMAN

Ms. LICHTMAN. I respectfully request to submit to you a longer statement, if you will, and, as well, to put into the record the report that the Women's Legal Defense Fund did.

The CHAIRMAN. Without objection, it will be placed in the record.

Ms. LICHTMAN. Mr. Chairman and members of the committee, I come here reluctantly, for it is not easy to testify in opposition to a judicial nominee. When these hearings opened, it was clear that the record cast grave doubt on Judge Clarence Thomas' commitment to affirm and support fundamental principles of equal employment opportunity, constitutional protections against gender discrimination, and reproductive freedom.

After 5 days of testimony from the nominee, our alarm has increased. The next U.S. Supreme Court Justice will help determine the outcome in cases that will affect our lives well into the next century. Judge Clarence Thomas' record is deeply troubling, because it includes an extensive pattern of disregard for principles of fundamental importance to women and their families.

In his testimony, Judge Thomas has intensified, rather than allayed, our concerns. While trying to distance himself from statements and positions articulated during 10 years as a public figure, Judge Thomas has alternately suggested that his record is not relevant to this inquiry or that he cannot be held to words he did not mean or to references he did not thoroughly explore. We urge this committee not to allow Judge Thomas to selectively choose which portions of his record are relevant to conformation.

Judge Thomas has tried to use judicial impartiality to justify his refusal to respond to questions on women's fundamental right to reproductive choice, while failing to apply the same standard to other constitutional issues. This tactic blurs the distinction between prejudging a specific case that may come before the Court and discussing the constitutional analysis applicable generally in cases of that type.

A woman's ability to enjoy all other personal liberties guaranteed by the Constitution depends upon her freedom to make personal decisions about procreation. Judge Thomas' professed lack of opinion on the constitutional right to choose—particularly in light of his record—strains credulity.

But reproductive choice is not the only area in which Judge Thomas has been less than forthcoming. He did not provide adequate assurance that he is committed to striking down invidious

sex-based discrimination, failing to make a commitment to apply a rigorous level of scrutiny to sex-based distinctions in the law. It is not clear that this nominee is willing or able to ferret out and reject stereotypes reflected in the law.

Under Judge Thomas' leadership, the EEOC failed to prevent employers from excluding women of child-bearing age from certain high-paying jobs, because hazards associated with those jobs could harm their fetuses they might carry. These policies allowed employers to selectively discriminate against women workers, rather than cleaning up the workplace for all employees, women and men. Several women were sterilized, so that they could keep their jobs under these "forced-sterilization" or "fetal protection" policies. The analysis finally adopted under Judge Thomas' leadership would have allowed employers to continue to exclude all fertile women of child-bearing age from these jobs. Fortunately, the Supreme Court soundly rejected Judge Thomas' analysis.

Judge Thomas also has attempted to distance himself from his praise for academic Thomas Sowell's analysis of working women, suggesting that he did not necessarily adopt or agree with all of Sowell's conclusions. Yet, in a 1987 interview, Judge Thomas referred to Sowell as "not only an intellectual mentor, but my salvation as far as thinking through these issues." This is particularly significant, because Mr. Sowell's commentary—lauded in 1988 by Judge Thomas as a "much-needed antidote to clichés about women"—is riddled with just the sort of stereotypes that the Court has consistently rejected as constitutionally repugnant.

Since his nomination, Judge Thomas has abandoned candor and consistency and offered little real assurance of his commitment to protecting women's freedom and equality. Judge Thomas either is running from his record or he has not carefully thought through critical issues that have enormous significance for Americans. Either way, it is evident that a lifetime appointment on our Highest Court for Judge Clarence Thomas would pose a danger to the economic security and personal freedom of American women.

The Court's vigilance is needed now more than ever, as gender-based discrimination still tarnish the American dream. The stakes simply are too high to entrust our constitutional future to a nominee like Clarence Thomas, who does not demonstrate unwavering commitment to the law's essential guarantees of individual rights and liberties.

I urge you to refuse to confirm Judge Thomas to the U.S. Supreme Court.

I went over, and I apologize. Thank you.

[Prepared statement and report follow:]

TESTIMONY OF JUDITH L. LICHTMAN  
President, Women's Legal Defense Fund  
before the United States Senate  
Committee on the Judiciary  
September 17, 1991

Chairman Biden and Members of the Committee, my name is Judith L. Lichtman. As President of the Women's Legal Defense Fund, I am pleased to have this opportunity to testify before you on the nomination of Judge Clarence Thomas to the Supreme Court.

This nomination comes at a time when women, especially women of color who face double discrimination based on both gender and race, are ever more vulnerable to invidious discrimination that threatens their economic security and personal freedom. With a Supreme Court that appears poised to roll back the law's most basic protections of equality and individual liberty, the next Justice will help determine the outcome of cases that carry enormous meaning for our lives far into the 21st century.

The Supreme Court's impact on women's lives is made clear in Johnson v. Transportation Agency, Santa Clara County,<sup>1</sup> where the Court upheld women's access to equal employment opportunity. That case centered around the promotion of Diane Joyce to the position of county road dispatcher -- a position never before held by a woman. In fact, no woman had ever held any of the county's 238 skilled positions. As part of a voluntary effort to bring qualified women into its skilled workforce, the county promoted Ms. Joyce, the only woman in a pool of seven persons

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<sup>1</sup> 480 U.S. 616 (1987).

judged qualified on the basis of experience and an oral interview. A male candidate who had scored 75 to her 73 in a subjective oral interview filed suit. When the Court upheld the county's plan to expand equal employment opportunity to qualified women and people of color, it demonstrated its power to extend -- or deny -- such opportunity.<sup>2</sup>

Because the Court exerts life-shaping force on millions of Americans, the record of each and every nominee must be carefully examined. Despite Judge Thomas' impressive personal achievements, his record reveals an extensive pattern of disregard for principles of fundamental importance to women and their families. As we have documented in our report, Endangered Liberties: What Judge Thomas' Record Portends for Women, Judge Thomas' record suggests that the prism through which he views the legal claims of women is clouded by an ideology that misinterprets, restricts, or ignores legal principles of the greatest importance. We ask that this report be included in the record of these confirmation hearings.

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<sup>2</sup> Judge Thomas harshly criticized the Court's decision as "social engineering" and urged lower courts to look to Justice Scalia's dissent for guidance. "Anger and Elation at Ruling at Affirmative Action," N.Y. Times, March 29, 1987, at D1, col. 1; Thomas, Speech before the Cato Institute, April 23, 1987, at 20-21. In fact, the county's program appears remarkably similar to the program under which Judge Thomas was admitted to Yale Law School. Both involved the consideration of race and/or gender in choosing among qualified applicants competing for a limited number of openings; both operated within the framework of federal anti-discrimination law (Title VII, which bars race- and sex-based discrimination in employment, and Title VI, which prohibits race-based discrimination by programs receiving federal funds, such as educational institutions).

Judge Thomas' record alone leaves us unwilling to entrust our constitutional future to his care; five days of his testimony during these hearings has done nothing to allay our concerns. Indeed, Judge Thomas' efforts to distance himself from his record of the past 10 years as a public figure suggests either that he believes that this record is not relevant to the Senate's inquiry or that he believes he cannot be held to his words and writings because he did not mean them or did not read them. He has refused to discuss the issue of constitutional protection of reproductive choice, despite his willingness to discuss other pressing constitutional questions. And, when he has responded to questions of critical importance to women -- such as constitutional protections against sex discrimination -- his answers have provided little reassurance.

Judge Thomas has attempted to retreat from his record during these confirmation hearings.

Throughout his 10 years as a public official, Judge Thomas has delivered speeches, written articles, and signed onto reports discussing issues of the greatest concern to women, in particular women of color, and their families. Despite Judge Thomas' attempts to distance himself from this record throughout these hearings, we submit that this record can not be so easily dismissed.

In numerous speeches and articles, Judge Thomas has reiterated his support for a "higher law" or "natural rights"

theory of constitutional law. He maintained in 1988, for example, that

[H]igher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges. . . . The higher law background of the American Constitution, whether explicitly invoked or not, provides the only firm basis for a just, wise, and constitutional decision.<sup>3</sup>

Judge Thomas now says that his numerous references to natural law theory were not intended to suggest that he believed that it should be used as a form of constitutional analysis, and that he sees no "role for the use of natural law in constitutional adjudication."<sup>4</sup> Rather he dismisses his extensive writings and speeches as nothing more than the musings of a "part-time political theorist."<sup>5</sup>

Another example of Judge Thomas' efforts to retreat from his record concerns his 1987 praise for an article by Lewis Lehrman as "a splendid example of applying natural law." The article urged that Roe v. Wade was incorrectly decided and that the

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<sup>3</sup> Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63, 64, 68 (1988) (emphasis in original). Our concerns about natural law jurisprudence are premised on the possibility that cases will be decided on the basis of judges' personal beliefs and intuitions -- beliefs that Judge Thomas was often unwilling to discuss during these hearings.

<sup>4</sup> Transcript of Proceedings on the Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court before the Senate Committee on the Judiciary (hereinafter "Transcript"), 9/10/91 p.m. at 137.

<sup>5</sup> Transcript, 9/11/91 p.m. at 135.

Constitution affirmatively protects the "right to life."<sup>6</sup> During these hearings Judge Thomas sought to distance himself from the Lehrman article by explaining that he praised it only to win over his audience of conservatives<sup>7</sup> -- not because he actually believed what he was saying about it.<sup>8</sup>

Judge Thomas' comments on his authorship of a 1986 report offer still another example of his attempted retreat from his record during these confirmation hearings. Judge Thomas served on the 1986 White House Working Group on the Family, which produced a report sharply critical of Roe v. Wade and other Supreme Court decisions protecting the right of privacy, including the right of unmarried individuals to buy and use contraceptives.<sup>9</sup> Although his name appears on the report as

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<sup>6</sup> Address by Clarence Thomas, "Why Blacks Should Look to Conservative Policies," The Heritage Foundation (June 18, 1987) at 9, praising Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other," The American Spectator 21-23 (April, 1987).

<sup>7</sup> "My interest [in citing the Lehrman article] was a very single-minded interest, Senator, and that was in trying to convince a conservative audience in the Lew Lehrman Auditorium of the Heritage Foundation, with a concept that Lew Lehrman adopted, to make my point, and it was an important point to me." Transcript, 9/10/91 p.m. at 198.

<sup>8</sup> "[A]t no time did I adopt or endorse the substance of the article itself." Transcript, 9/11/91 p.m. at 95.

<sup>9</sup> A Report to the President from the White House Working Group on the Family, The Family: Preserving America's Future, December 1986, at 11-12.

one of its authors, he now testifies that he never read the controversial portions of the report at any time.<sup>10</sup>

At other times in these hearings, Judge Thomas has argued that his record as a public figure is now largely irrelevant to this inquiry to his fitness for the Supreme Court.<sup>11</sup> It should be of great concern to members of this Committee and to the American public that the White House wants us to look favorably on the personal background of Judge Thomas, while dismissing or discounting his actions and statements during 10 years as a public official. If confirmed, Judge Thomas will bring the entire range of his experiences and beliefs to bear on his deliberations in the Court. The Senate should not accept his attempt to pick and choose for these confirmation hearings which portions of his record are relevant for consideration in evaluating his fitness for the Court.

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<sup>10</sup> "The Chairman: You haven't to this moment read that report?

Judge Thomas: To this day, I have not read that report. I read the sections on low-income families."

Transcript, 9/10/91 p.m. at 154-55.

<sup>11</sup> E.g., as Judge Thomas advised Senator Kohl, "I think that you have to weigh or discount to the best of your abilities or your judgment speeches that were made outside of the judiciary when one has a different role, for example a person who's a law professor, a person who's in the executive branch. But I think it would be important to look closely at a speech that I made as a judge." Transcript, 9/13/91 p.m.

Judge Thomas refused to respond to critical questions on the constitutional right to privacy, including a woman's right to choose whether to terminate or continue her pregnancy.

Judge Thomas asks this Committee, the Senate, and the American public to support his nomination while refusing to provide assurances that he will protect our rights if elevated to the Court. Nowhere is this more clear than in Judge Thomas' refusal to respond to questions about his views on the constitutional right of privacy. What is at stake here is not mere theoretical principle -- the lives, health, and livelihoods of millions of women and their families hang in the balance.

Judge Thomas professes to have an open mind on the constitutional protection afforded the right to terminate a pregnancy.<sup>12</sup> But in the years before this nomination, he expressed opinions critical of Roe v. Wade and other Supreme Court decisions involving the right of privacy.<sup>13</sup> Indeed, as discussed above, Judge Thomas endorsed an anti-choice diatribe

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<sup>12</sup> See e.g., Transcript, 9/11/91 p.m. at 105:

"Senator Leahy: Let me ask you this. Have you made any decision in your own mind whether you feel Roe v. Wade was properly decided or not, without stating what that decision is?"

Judge Thomas: I have not made, Senator, a decision one way or another with respect to that important decision."

<sup>13</sup> See Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63, n.2 (1989); Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years 391, 399 (D. Boaz, ed. 1988); A Report to the President from the White House Working Group on the Family, The Family: Preserving America's Future, December 1986). For a discussion of Judge Thomas' stated views on Roe v. Wade and the right to privacy, see Endangered Liberties: What Judge Thomas' Record Portends for Women, a Report by the Women's Legal Defense Fund (July 30, 1991).

that concluded that the fetus has a "God-given" "inalienable right to life."<sup>14</sup>

Now, despite that record, Judge Thomas asks this Committee to believe not only that he has an open mind about the right to choose, but that he actually has no opinion on the issue. In response to questions from Senator Leahy, Judge Thomas stated that in the 18 years since Roe v. Wade was decided, he has never debated the case or formed an opinion about what he even acknowledged is "one of the more important" and "one of the more highly publicized and debated cases."<sup>15</sup> Judge Thomas' professed lack of opinion -- particularly when viewed in the context of his record -- strains credulity.

In refusing to answer questions about Roe, Judge Thomas hid behind the mantle of judicial impartiality.<sup>16</sup> This tactic blurs the distinction between prejudging a specific case involving specific facts that may come before the Court, and commenting on the constitutional standards applicable generally in cases of that type. Indeed, Judge Thomas' testimony on other cases that present issues that will come before the Court shows that his

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<sup>14</sup> Address by Clarence Thomas, "Why Blacks Should Look to Conservative Policies," The Heritage Foundation (June 18, 1987) at 9, praising Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other," The American Spectator 21-23 (April, 1987).

<sup>15</sup> Transcript, 9/11/91 p.m. at 103-106.

<sup>16</sup> See e.g., Transcript, 9/10/91 p.m. at 149: "I do not think that at this time that I could maintain my impartiality as a member of the judiciary and comment on that specific case [Roe v. Wade]."

professed concerns about impartiality were selectively applied.<sup>17</sup> In adopting this strategy of selective silence, Judge Thomas assumes that the Committee will not view his failure to respond to questions on privacy and choice as significant.

Would the Senate Judiciary Committee confirm a Supreme Court nominee who trumpets his or her open-mindedness on the issue of whether segregated schools violate the Fourteenth Amendment's guarantee of equal protection? Of course not. The idea of confirming a nominee who does not firmly support such a sacrosanct legal principle is unthinkable.

The fundamental principles articulated in Roe are as critical as those spelled out in Brown. A woman's ability to enjoy all other personal liberties guaranteed by the Constitution hinges upon her freedom to make personal decisions about procreation. This Committee should reject any nominee who fails to affirm the right to choose just as it should, and would, reject a nominee who failed to affirm the constitutional principles enunciated in Brown. As Chief Justice Rehnquist recognized in 1959, in the wake of the Brown decision, "what could have been more important to the Senate [in 1957] than Mr. Justice Whittaker's views on equal protection and due process? ...The only way for the Senate to learn of these sympathies is to

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<sup>17</sup> E.g., Transcript, 9/10/91 p.m. at 162 (death penalty appeals); 9/10/91 p.m. at 163-64 (Payne v. Tennessee and victim impact statements); 9/10/91 p.m. at 164 (federal sentencing guidelines); 9/10/91 p.m. at 168-69 (exclusionary rule); 9/10/91 p.m. at 171 (free exercise clause); 9/12/91 a.m. at 15-16 (establishment clause).

'inquire of men on their way to the Supreme Court something of their views on these questions.'"<sup>18</sup>

To the extent that Judge Thomas responded to questions on constitutional equal protection theory, his answers provided inadequate assurances of his commitment to strike down invidious sex-based discrimination.

In refusing to answer any questions on abortion or constitutional protections of reproductive freedom -- while responding to other questions about unsettled areas of the law -- Judge Thomas has abandoned candor and consistency. This creates a double standard that works against any commitment to protections of women's freedom and equality. At the same time, Judge Thomas would have us believe that he has isolated reproductive choice as the only area of critical importance to women about which he was not forthcoming. Such is not the case.

For example, Judge Thomas' discussion of equal protection analysis failed to provide adequate assurances of his commitment to the Constitution's most basic protections against sex discrimination: the equal protection clause of the Fourteenth Amendment. This is the primary constitutional source of equality for women; the Supreme Court has consistently used it to strike down sex-based distinctions in the law that are based on "archaic and stereotypic notions."<sup>19</sup>

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<sup>18</sup> Rehnquist, "The Making of a Supreme Court Justice," Harvard Law Record, October 8, 1959, at 10.

<sup>19</sup> Mississippi University for Women v. Hogan, 458 U.S. 718, 742 (1982).

Judge Thomas appeared at first blush to offer satisfactory assurances that he supports the Court's equal protection analysis of constitutional claims of sex discrimination. For example, Judge Thomas told Senator DeConcini: "I have no reason and had no reason to question or disagree with the three-tier approach"<sup>20</sup> and "I do accept this structure of the three-tier test."<sup>21</sup>

Upon careful review, though, his claims fall short of a commitment to apply a rigorous level of scrutiny to sex-based distinctions in the law. As he told Senator DeConcini later in the hearings,

I think that it's important that when I don't know where I stand on something or I haven't reviewed it in detail, that it's best for me to -- to take a step back and say 'I have no reason to disagree with it' rather than saying 'I adopt it as mine.'<sup>22</sup>

This makes clear that, absent explicit assurances, Judge Thomas' testimony on equal protection analysis cannot be construed as an actual commitment to apply such analysis to constitutional claims. Without such a commitment, women are left vulnerable to invidious sex discrimination.<sup>23</sup>

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<sup>20</sup> Transcript, 9/11/91 a.m. at 59.

<sup>21</sup> Id. at 60.

<sup>22</sup> Transcript, 9/13/91 p.m. at 60.

<sup>23</sup> With the departure of Justice Marshall, only four sitting Justices (Justices Blackmun, O'Connor, Stevens, and White) are on record as applying heightened scrutiny analysis to constitutional claims of sex discrimination. Chief Justice Rehnquist has generally been hostile to heightened scrutiny. E.g., Mississippi University for Women v. Hogan, 458 U.S. 718, 742 (1982) (Powell, J., and Rehnquist, J., dissenting); Craig v.

Nor did Judge Thomas provide any assurances that he would apply equal protection analysis free of stereotypic notions about women that too often work to limit their lives and opportunities. As Justice O'Connor has made clear, the Court must apply its test "free of fixed notions concerning the roles and abilities of males and females," and must reject classifications that "reflect[] archaic and stereotypic notions."<sup>24</sup> For example, the Court rejected such stereotypes in striking down statutes that provided Aid to Families with Dependent Children to families when the father became unemployed, but not when the mother lost her job<sup>25</sup> -- a statute based on the stereotype that the wages of fathers, but not mothers, are essential to families' economic security.

Judge Thomas' responses in no way made clear that he is willing or able to ferret out and reject such stereotypes when reflected in the law. For example, in 1988 Judge Thomas lauded academic Thomas Sowell's analysis of working women as "a much-needed antidote to cliches about women's earnings and

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Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting) (both arguing that gender-based classifications need only pass under "rational basis" scrutiny). Justices Scalia, Kennedy, and Souter have not yet addressed any sex-based equal protection challenge, so their positions remain unknown.

<sup>24</sup> Mississippi University for Women v. Hogan, 458 U.S. 718, 742 (1982).

<sup>25</sup> Califano v. Westcott, 443 U.S. 76 (1979).

professional status."<sup>26</sup> Yet Sowell's commentary is riddled with just the sort of stereotypes that the Court has consistently rejected as constitutionally repugnant. For example, Sowell wrote that

What are called 'traditional' women's jobs are often jobs which meet other specific requirements that make sense to women -- slow obsolescence rates, adjustable hours, and less demand for physical strength are just a few examples. Where particular jobs are especially attractive to particular groups, those jobs are likely to have their pay held down by the competition of many applicants.<sup>27</sup>

During these hearings Judge Thomas attempted to downplay his praise for Sowell's analysis of working women, suggesting that he did not necessarily adopt or agree with all of Sowell's conclusions.<sup>28</sup> Yet in a 1987 interview, Judge Thomas referred to Sowell as "not only an intellectual mentor but my salvation"<sup>29</sup> when discussing discrimination issues. Judge Thomas also failed to identify the "cliches" to which Mr. Sowell's commentary -- which concludes that sex-based inequities in pay and career advancement stem from women's own choices and behavior -- provided an "antidote."

Nor was Judge Thomas willing to refute during these hearings Mr. Sowell's unqualified assertion that "women are typically not

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<sup>26</sup> Thomas, "Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," Lincoln Review, vol. 8, no. 2 at 15-16 (Winter 1988).

<sup>27</sup> Sowell, Civil Rights: Reality or Rhetoric? (1984) at 107-08.

<sup>28</sup> Transcript, 9/10/91 p.m. at 192-94; 9/11/91 a.m. at 66.

<sup>29</sup> "Clarence Thomas," Reason (November 1987) at 30.

educated as often in such highly paid fields as mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields such as construction work, lumberjacking, coal-mining, and the like."<sup>30</sup>

Judge Thomas' failure to recognize and reject dangerous stereotyping statements casts serious doubts about his commitment to apply equal protection analysis free of fixed notions about women's roles and abilities, as the Court's constitutional jurisprudence requires.

### Conclusion

Judge Thomas' record casts grave doubt about his commitment to affirm and support fundamental principles of equal employment opportunity, constitutional protections against gender discrimination, and reproductive freedom. This record should not be ignored -- instead, it must be part of this Committee's determination of his fitness to serve on the Supreme Court.

Judge Thomas' responses to this Committee have failed to assuage our concerns. He has endeavored to distance himself during these five days of testimony from statements and positions he has articulated during the past 10 years as a public figure. He has refused to respond to questions on women's fundamental right to reproductive choice on grounds of judicial impartiality,

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<sup>30</sup> Sowell, Civil Rights at 92. Indeed, Judge Thomas remarked only that "I can't say whether or not women are attracted or not attracted to those areas. I think that is a normative comment there." Transcript, 9/11/91 a.m. at 65-66.

although he failed to invoke the same doctrine in responding to inquiries involving other pressing constitutional issues. And his responses to questions on constitutional protections against gender discrimination failed to provide adequate assurance of his commitment to strike down invidious sex-based discrimination.

The Court's vigilance is needed now more than ever, as gender- and race-based discrimination still tarnish the American dream. The stakes are too high to entrust our constitutional future to any nominee who does not demonstrate unwavering commitment to the law's essential guarantees of individual rights and liberties. Judge Thomas' testimony reaffirms our opposition to his confirmation. Either he is running from his record, which strains credulity, or he has not carefully thought through critical issues carrying enormous significance for the lives of Americans. Either way, Judge Thomas should not be confirmed.

**ENDANGERED LIBERTIES:  
What Judge Clarence Thomas' Record Portends for Women**

**A Report by the Women's Legal Defense Fund  
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**July 30, 1991**



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**EXECUTIVE SUMMARY**

The Supreme Court and our nation are at a crossroads. This is a time when women, especially women of color who face double discrimination based on both gender and race, are ever more vulnerable to invidious discrimination that threatens their economic security and personal freedom. The Court is poised to roll back the law's most basic protections of equality and individual liberty. At this critical time the judicial philosophy -- the principles that inform legal analysis -- of each Justice will determine the outcome of cases that carry enormous meaning for our lives far into the 21st century.

This report analyzes Judge Clarence Thomas' record in three key areas of particular concern to women: equal employment opportunity, constitutional protections against gender discrimination, and reproductive freedom. After reviewing Judge Thomas' words and actions, the Women's Legal Defense Fund finds in his record a disturbing pattern of disregard for these most fundamental principles.

First, Judge Thomas' record as leader of the agency charged with enforcing the nation's laws prohibiting employment discrimination is deeply troubling. It reveals a predilection to interpret restrictively equal opportunity laws that have proven essential to the economic security of working women and their families. While chair of the Equal Employment Opportunity Commission (EEOC), Judge Thomas too often worked to deny equal employment opportunity -- even as he was sworn to enforce the

nation's laws designed to expand such opportunity. For example, he stripped or attempted to strip the agency of several of its most effective tools for enforcing federal anti-discrimination law:

- As EEOC chair, Judge Thomas retreated from the proven and effective enforcement strategy of systemic litigation, while individual victims of discrimination too often received no remedy at all;
- Judge Thomas attacked affirmative action as a strategy in battling on-the-job discrimination, despite its proven effectiveness and repeated affirmation by the Supreme Court; and
- Judge Thomas proposed to weaken federal guidelines that set standards for employee selection practices in contravention of prevailing law.

As EEOC chair, Judge Thomas also:

- refused to perform his duty as required by law to enforce and evaluate anti-discrimination efforts by the federal government;
- failed to enforce the law against sex discrimination to ban employment practices that exclude all women of child-bearing age from certain high-paying jobs;
- failed to challenge gender-based wage discrimination under Title VII and the Equal Pay Act; and
- failed to enforce federal age discrimination law -- letting the claims of thousands of older workers lapse -- and took policy positions against the interests of the older workers he was sworn to protect.

Second, Judge Thomas' views of constitutional rights, articulated over more than 10 years as a public figure, reveal an allegiance to a judicial philosophy that could prove inimical to and inconsistent with the rights of women. For example, his oft-expressed support for jurisprudence based on a theory of "natural

rights" raises substantial concern about his adherence to the Constitution's most basic guarantees against sex discrimination:

- Judge Thomas' seeming indifference to the Equal Protection Clause is troubling, as the Equal Protection Clause has been interpreted as the primary source of constitutional protections against sex discrimination;
- Judge Thomas has not stated how or whether he would apply a natural rights analysis to sex discrimination; historically, though, natural law principles have been used to limit the lives and opportunities of women; and
- Judge Thomas has embraced an analysis of the status of working women that denies the reality of discrimination they face and its effects on their economic security and individual opportunity.

Third, Judge Thomas' record contains strong indications that he opposes the constitutional right to privacy that includes a woman's right to reproductive freedom:

- Judge Thomas praised as a "splendid example of applying natural law" an article arguing not only that Roe v. Wade was wrongly decided but that the Constitution affirmatively protects the fetus' "right to life";
- Judge Thomas served on the 1986 White House Working Group on the Family, which authored a report sharply criticizing Roe and other Supreme Court decisions protecting the right of privacy; and
- In other writings, Judge Thomas criticized Roe and even Griswold v. Connecticut, the case protecting the fundamental right of married couples to use contraceptives.

Taken as a whole, Judge Thomas' words and actions reveal a pattern of judgment and legal analysis that we find deeply troubling. We fear that the prism through which he views the legal claims of women, especially women of color, and disadvantaged people is clouded by an ideology that

misinterprets, ignores, or restricts legal principles of the greatest importance. In short, we believe that his record raises significant questions about his fitness for a lifetime appointment to the Supreme Court, the last bastion for justice and the protection of constitutional rights and liberties for all Americans.

**INTRODUCTION: THE CURRENT CLIMATE ON THE COURT**

The loss of Justice Thurgood Marshall as a key voice for equality and individual dignity leaves a void that must be filled with the greatest care. Careful scrutiny of any nominee to the Court is thus essential if our nation is to live up to its aspirations of "liberty and justice for all." The stakes are too high to entrust our constitutional future to any nominee who does not demonstrate unwavering commitment to the law's essential guarantees of individual rights and liberties.

Indeed, recent evidence confirms that the Court's vigilance in this area is needed now more than ever, as gender- and race-based discrimination still tarnish the American dream. For example:

- A recent General Accounting Office study on federally sponsored job training programs found that 20 percent of the programs discriminated against women and blacks. Some complied with employers' requests for white applicants only; others provided women and blacks with less classroom training and steered them towards lower-wage jobs.<sup>1</sup>

- Women of color suffer the economic effects of double discrimination. Economist Marilyn Power of Sarah Lawrence College found that black women are still frequently trapped in low-wage jobs: in 1989, 27.3 percent of employed black women were in low-paying service occupations, as compared to 16.1 percent of white women.<sup>2</sup>

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<sup>1</sup> Hearings Before the Subcommittee on Employment and Housing of the House Committee on Government Operations, 102d Cong., 1st Sess. (July 17, 1991) (statement of Lawrence H. Thompson, Assistant Comptroller General, General Accounting Office, on Job Training Partnership Act: Racial and Gender Disparities in Services).

<sup>2</sup> M. Power, "Occupational Mobility of Black and White Women Service Workers," (Presented at the Institute for Women's Policy Research Second Annual Women's Policy Conference, June, 1990) (unpublished manuscript).

■ A 1991 study by The Urban Institute examined racial discrimination in hiring by charting the relative success of black and white men in the hiring processes of randomly-selected private-sector jobs. When pairs of men who were matched in all characteristics other than race -- age, speech, education, work experience, demeanor, and physical build -- applied for the same job, whites advanced farther than blacks 20 percent of the time; blacks advanced farther than whites only seven percent of the time. Whites received a job offer 15 percent of the time, compared to five percent for blacks.<sup>3</sup>

As another recent study has found, "setting a tone that condemns acts of bias and hatred will, in fact, discourage them."<sup>4</sup> Psychologists at Smith College found that people are encouraged to express anti-racist opinions after hearing others voice similar views. Those who hear opinions that condone racism are more likely to support or only weakly condemn racist incidents. These experts conclude that "[i]f national authorities were more vocal in disapproving of prejudice, you'd have less of it."<sup>5</sup> Such findings underscore the need for strong leadership from the Supreme Court in refusing to tolerate illegal discrimination.

In a cast of only nine players, every member of the Court plays an important role. The dynamics of this small body that must reach all its decisions by majority are dramatically affected by each new appointment. Even if this Court's decisions on important issues of our day are increasingly predictable, what

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<sup>3</sup> The Urban Institute, Opportunities Denied, Opportunities Diminished: Discrimination in Hiring 19 (1991).

<sup>4</sup> "New Ways to Battle Bias: Fight Acts, Not Feelings," N.Y. Times, July 16, 1991, at C1.

<sup>5</sup> Id.

the decisions say and how they say it are not at all certain. Indeed, the Court's underlying reasoning and analysis set precedents for future cases that are just as important as identifying the winning and losing parties. Thus, each case is shaped by the approach of a new Justice.

Because the Rehnquist Court has moved farther to the right in recent years, we believe the margin by which cases are decided has also become increasingly important: the closer the case, the narrower the opinion because Justices are less willing to extend their reasoning beyond the fact situation at hand. On the other hand, comfortable 7-2 margins free the Court to write far more sweeping opinions, unrestrained by the need to accommodate a hesitant member of a shaky coalition. Without diversity of viewpoint among members of the Court, the Rehnquist majority will be even more emboldened to produce aggressively conservative opinions.

Indeed, just such aggressiveness provoked an ominous warning from Justice Marshall in his final opinion. His words speak eloquently about why we must care about his successor. In his dissenting opinion in Payne v. Tennessee,<sup>6</sup> Justice Marshall warned that the Court had launched a "far-reaching assault upon this Court's precedents" and that in so doing, the majority "sends a clear signal that essentially all decisions implementing

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<sup>6</sup> 59 U.S.L.W. 4814 (U.S. June 25, 1991) (No. 90-5721).

the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination."<sup>7</sup>

It becomes clear from reading the Chief Justice's majority opinion in Payne why Justice Marshall was so alarmed. The Chief Justice declared that the Court's principle of adhering to its own precedent is strongest in cases involving property and contract rights, weakest in cases involving the Constitution or procedural and evidentiary rules.<sup>8</sup> By applying Chief Justice Rehnquist's additional criterion for overruling -- that a case either was decided or reaffirmed by a 5-4 margin "over spirited dissen[t]"<sup>9</sup> -- it becomes clear that this Court is poised to alter some of the most important rulings of the past. The victims of such revisions are likely to be women, especially women of color, and disadvantaged people.

Justice Marshall was so disturbed by the Court's shift that he compiled an "endangered precedents" list. This list includes Metro Broadcasting v. FCC,<sup>10</sup> Justice Brennan's final opinion in which five members of the Court upheld affirmative action programs for minority broadcasters; and Thornburgh v. American

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<sup>7</sup> Payne, supra, at 4825-26 (Marshall, J., dissenting).

<sup>8</sup> Id. at 4819.

<sup>9</sup> Id.

<sup>10</sup> 110 S.Ct. 2997 (1990).

College of Obstetricians and Gynecologists,<sup>11</sup> which reaffirmed the right to abortion recognized in Roe v. Wade.<sup>12</sup>

Given this inclement judicial climate, next term's docket provides fertile ground for the Rehnquist Court to assault civil rights, social welfare, and reproductive freedom. The Court already has agreed to hear two cases challenging the government's role in eradicating the vestiges of race-based segregation. Freeman v. Pitts<sup>13</sup> involves the desegregation policies of the DeKalb County, Georgia, public schools, which were formerly segregated by law and have been under federal court supervision since the 1960s. The county argues that it should no longer be forced to operate under a court decree -- even though segregation has been perpetuated in its schools. The other case, United States v. Mabus,<sup>14</sup> concerns a Department of Justice challenge to Mississippi's state university system, which remains almost completely segregated by race. Mississippi claims (and a lower federal court agreed) that the state has done all it needs to do. In each case, the Court will decide whether the governmental

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<sup>11</sup> 476 U.S. 747 (1986).

<sup>12</sup> 410 U.S. 113 (1973).

<sup>13</sup> 887 F.2d 1438 (11th Cir. 1989), cert. granted, 111 S.Ct. 949 (1991).

<sup>14</sup> 914 F.2d 676 (5th Cir. 1990), cert. granted, 111 S.Ct. 1579 (1991).

entity has met its constitutional obligation to dismantle segregated public institutions.<sup>15</sup>

Even more ominous, the Court may soon choose to reconsider the critical 1973 Roe v. Wade decision. Indeed, no fewer than four laws may provide the test case for overturning Roe:

- Pennsylvania's anti-choice law, enacted in 1989, is furthest along in the federal appeals process. Pennsylvania's statute was found unconstitutional by a federal district court in 1990. The invalidated provisions include a 24-hour waiting period, husband notification, mandatory "counseling," and "informed" parental consent;
- Guam's 1990 law prohibits abortions except when two physicians determine that there is a substantial risk that continuing the pregnancy would endanger the woman's life or gravely impair her health. A federal district court found the statute unconstitutional;
- Utah's statute, enacted in January 1991, bans abortions except in cases of rape or incest, or in situations where the woman's life is in danger, there would be grave damage to the woman's medical health, or the fetus has grave defects. The state delayed enforcement of the statute until a federal district court rules on its constitutionality; and
- Louisiana's 1991 law is the most restrictive in the country, outlawing abortion except in cases of rape, incest, or to save the woman's life. Any doctor who performs an illegal abortion may be imprisoned for up to 10 years and liable for a \$100,000 fine. Trial in district court is scheduled for August; many predict that the case will be quickly shepherded through the appeals process to come before the Supreme Court next term.

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<sup>15</sup> Another case that the Court will hear in the coming term directly affects women's ability to challenge sex discrimination by educational institutions. In Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990), cert. granted, 59 U.S.L.W. 3823 (U.S. June 10, 1991) (No. 90-918), the Court will decide whether victims of sex discrimination in education can recover damages for those violations under Title IX.

Presaging a willingness to reject the constitutional right to an abortion, the Court this year upheld a ban on abortion counseling at federally-funded health clinics in Rust v. Sullivan.<sup>16</sup> Justices Rehnquist, White, Scalia, and Kennedy appear prepared to overrule Roe. It is less clear how Justice O'Connor or Justice Souter would vote. With Justice Marshall's departure, only two Justices remain who fully support the Roe decision -- Justice Stevens and its author, Justice Blackmun. Perhaps no other area of the law will be as significantly shaped by the next Justice as the constitutional right to privacy.

Clearly, millions of women will be affected by the next Court's rulings in this and other areas critical to women's lives, opportunities, and autonomy. The Rehnquist Court's unbridled willingness -- indeed eagerness -- to overturn precedent in the area of personal liberties will either be encouraged or restrained by the next appointment to the Court.

In the remainder of this report, we review Judge Thomas' record on these questions. Unfortunately, as this review shows, his record suggests a nominee who is actively hostile to the law's guarantees of "liberty and justice" for all.

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<sup>16</sup> 111 S.Ct. 1759 (1991).

**EQUAL EMPLOYMENT OPPORTUNITY**

In 1982, President Reagan appointed Clarence Thomas as chair of the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing federal laws that prohibit employment discrimination on the basis of sex, race, national origin, religion, and age. The EEOC also coordinates all equal employment programs in the federal workplace.

Judge Thomas' overall record at the EEOC casts doubt on his commitment to broad interpretations and aggressive enforcement of legal protections against employment discrimination, including those proven extremely effective in translating the dream of equal opportunity into reality for women, especially women of color.

Throughout his eight-year tenure as EEOC chair, Judge Thomas frequently attempted to narrow basic principles and mechanisms of anti-discrimination law. And he too often allowed his opinions to override his obligation to adhere to established law and legal doctrine. Further, Judge Thomas stripped or attempted to strip the agency of several of its most effective tools for enforcing federal anti-discrimination law:

- As EEOC chair, Judge Thomas retreated from the proven and effective enforcement strategy of systemic litigation, while individual victims of discrimination too often received no remedy at all;
- Judge Thomas attacked the use of affirmative action as a strategy in battling on-the-job discrimination, despite its proven effectiveness and repeated affirmation by the Supreme Court; and

- Judge Thomas proposed to weaken federal guidelines that set standards for employee selection practices in contravention of prevailing law.

As EEOC chair, Judge Thomas also:

- refused to perform his duty as required by law to enforce and evaluate anti-discrimination efforts by the federal government;
- failed to enforce the law against sex discrimination to ban employment practices that exclude all women of child-bearing age from certain high-paying jobs;
- failed to challenge gender-based wage discrimination under Title VII and the Equal Pay Act; and
- failed to enforce federal age discrimination law -- letting the claims of thousands of older workers lapse -- and took policy positions against the interests of the older workers he was sworn to protect.

Each of these concerns is discussed more fully below.

As EEOC chair, Judge Thomas retreated from the proven and effective enforcement strategy of systemic litigation, while individual victims of discrimination too often received no remedy at all.

In many contexts, discrimination is system-wide, infiltrating an entire institution or industry. Strategic class-based legal action is thus required to attack effectively practices that harm large numbers of women, especially women of color, and disadvantaged people. Systemic litigation not only provides meaningful remedies for the victims of discrimination, but also deters continued discrimination by employers. Because systemic litigation is often beyond the resources of most private individuals and attorneys, Congress has authorized the EEOC to

attack broad institutional patterns and practices of discrimination through systemic litigation.<sup>17</sup>

The extraordinary effectiveness of "systemic," or "class action," litigation was demonstrated by the recent settlement agreement between the EEOC and AT&T. Filed in 1978, EEOC's lawsuit challenged the pregnancy leave policies of Western Electric (the manufacturing arm of AT&T until the 1980s) and covered the thousands of employees who became pregnant between 1965 and 1977. The employer's policies discriminated against women by requiring pregnant women to take unpaid leave at the end of their sixth or seventh month of pregnancy, regardless of their ability and willingness to continue working; by providing pregnant workers on leave only limited credit towards seniority while male employees on disability leave received full credit; and by offering no guarantee of a job upon return from leave. The 1991 settlement provided \$66 million to compensate 13,000 women; the size and scope of the settlement no doubt sends a clear warning to employers across the country. It is nearly impossible to imagine each of these 13,000 victims of discrimination successfully pursuing her claim individually.

Despite the proven effectiveness of class action litigation, Judge Thomas criticized the EEOC's historic reliance on it and reduced the resources devoted to it, apparently causing a drastic reduction in the number of such cases brought by the agency.

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<sup>17</sup> The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

Since 1982, the number of attorneys in the litigation unit created to challenge systemic discrimination was reduced by about half. And the "early litigation identification" system, which had been instituted to identify potential systemic cases for litigation, was eliminated.<sup>18</sup>

It is thus not surprising that, while the EEOC filed a total of 218 class action lawsuits in fiscal year 1980, the number of such suits plummeted under Judge Thomas' leadership. During fiscal year 1989, the last full year of Judge Thomas' chairmanship, the EEOC filed only 129 class action suits.<sup>19</sup>

Judge Thomas justified this dramatic reduction by claiming that an "emphasis on 'systemic' suits led the Commission [prior to his appointment] to overlook many of the individuals who came to our offices to file charges and seek assistance."<sup>20</sup> He expressed preference for enforcing individual discrimination claims over attacking systemic discrimination. However, he failed to acknowledge that individual victims of discrimination -- such as the 13,000 victims of pregnancy discrimination at AT&T who were awarded \$66 million -- are the beneficiaries of class

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<sup>18</sup> Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 75 (1990) (statement of Nancy Kreiter, Research Director, Women Employed Institute).

<sup>19</sup> Women Employed Institute, EEOC Enforcement Statistics (1991).

<sup>20</sup> Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" 5 Yale Law and Public Policy Review 402, 404 (1987).

action litigation.<sup>21</sup> And, while any effective enforcement effort must naturally address both systemic and individual claims of discrimination, the EEOC under Judge Thomas did little of either.

Despite Judge Thomas' strong rhetoric, individual victims of discrimination were unlikely to receive any remedy during his tenure as EEOC chair. In fact, the EEOC under his leadership saw a sharp decline in the rate of remedies for individual claimants -- settlement rates plunged from 32.1 percent in fiscal year 1980 to 13.9 percent in fiscal year 1989.<sup>22</sup>

Moreover, the percentage of cases where the individual claimant received no remedy at all (classified as "no cause") nearly doubled under Judge Thomas, from 28.5 percent in 1980 to 54.2 percent in 1989.<sup>23</sup> Research shows that this sharp increase was due not to an increase in unsubstantiated charges filed, but rather to inadequate investigation.<sup>24</sup> In other

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<sup>21</sup> It is true that the agency steadily increased the number of cases it filed in court to 486 in FY 1989, up from 326 in FY 1980. The number includes class action and individual lawsuits filed. Women Employed Institute, EEOC Enforcement Statistics (1991). Thus the number of cases filed on behalf of individual claimants increased under Judge Thomas, but at the expense of class action litigation that can potentially compensate hundreds and even thousands of individual victims per suit -- as the AT&T case illustrates.

<sup>22</sup> Women Employed Institute, EEOC Enforcement Statistics (1991).

<sup>23</sup> Women Employed Institute, EEOC Enforcement Statistics (1991).

<sup>24</sup> A 1988 General Accounting Office study reviewed the investigations of charges that had been closed with "no-cause" determinations by six EEOC district offices and five state

words, more than half of those workers who took the not inconsiderable "time, effort, and risk to file charges against an employer they believe[d] to be discriminatory" saw their claims dismissed by the EEOC under Judge Thomas' leadership -- generally without adequate investigation.<sup>25</sup>

Indeed, Judge Thomas' EEOC policies all too often created barriers to claims of discrimination by individuals. For example, as will be discussed in greater detail below, thousands of individual claims of age discrimination, including those made by working women, lapsed during Judge Thomas' tenure at the EEOC, so that individual workers were stripped of their right to pursue their claims in court. Coupled with the retreat from systemic

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agencies between January and March 1987. The GAO study revealed that 41 to 82 percent of the charges closed by the EEOC offices were not fully investigated, and 40 to 87 percent of those closed by state agencies were not fully investigated. The GAO identified several factors contributing to the incomplete investigations: a perception by staff investigators that the Commission was more interested in reducing the backlog than full investigation; disagreement as to full investigation requirements; and inadequate monitoring of state investigations. U.S. General Accounting Office, Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges 3 (1988).

Similarly, the Women Employed Institute concluded that "'no-cause' determinations are being issued indiscriminately because of a lack of training on the part of the intake and investigative staff and management's emphasis on closing files." Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 74 (1990) (statement of Nancy Kreiter, Research Director, Women Employed Institute).

<sup>25</sup> Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 74 (1990) (statement of Nancy Kreiter, Research Director, Women Employed Institute).

litigation, the EEOC's poor record in responding to the claims of individual victims of discrimination drastically reduced the prevalence of meaningful remedies for discrimination under Judge Thomas. If Judge Thomas is elevated to the Supreme Court, this record augurs poorly for the claims of discrimination victims that will be considered by the Court in the future.

Judge Thomas attacked the use of affirmative action as a strategy in battling on-the-job discrimination, despite its proven effectiveness and repeated affirmation by the Supreme Court.

Without question, strong and effective remedies are necessary to eradicate the long legacy of discriminatory workplace practices that deny employment opportunities to women, especially women of color, and disadvantaged people. Affirmative action is among the most effective of the various strategies designed to remedy unlawful discrimination and expand equal opportunity. For this reason, Title VII of the Civil Rights Act of 1964 specifically authorizes courts to order affirmative action as a remedy when employers have violated the law.<sup>26</sup>

Although a variety of measures could be considered "affirmative action," the term most often refers to court-ordered or voluntary action that takes gender or race into account to provide meaningful opportunities for qualified women and people of color. Generally, these criteria are numerical "goals and

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<sup>26</sup> 42 U.S.C. § 2000e-5(g).

timetables" -- goals for training, hiring, assigning, or promoting qualified women and people of color; and timetables for achieving these goals.<sup>27</sup> The concept of "goals and timetables" was first introduced by the Department of Labor's Office of Federal Contract Compliance in the 1960s.<sup>28</sup> Goals and timetables were further incorporated into the affirmative action required of federal contractors by the Department of Labor under President Richard Nixon.<sup>29</sup>

Courts have repeatedly taken gender and/or race into account when fashioning remedies for unlawful discrimination. On many occasions, they have also approved voluntary efforts to correct historical imbalances in education, employment, and access to business opportunities. These efforts have played a crucial role in eliminating the effects of discrimination.

For example, the affirmative action required of federal contractors -- when effectively enforced -- provides a tremendous tool for expanding employment opportunities for women and people of color. In the late 1970s, the Office of Federal Contract

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<sup>27</sup> These goals are set with reference to the availability of qualified women or people of color in the relevant labor pool. Affirmative action programs with goals and timetables never require the hiring or promotion of unqualified people. To the contrary, hiring or promoting unqualified people is an abuse of affirmative action principles.

<sup>28</sup> 33 Fed. Reg. 7,804 (1968).

<sup>29</sup> George Shultz, Secretary of Labor under Richard Nixon, issued Order No. 4, which first specified the form of affirmative action for federal contractors. 35 Fed. Reg. 2,586 (1970). Revised Order No. 4, issued in 1971, required contractors to establish employment goals for women as well as for people of color. 36 Fed. Reg. 23,152 (1971).

Compliance Programs (OFCCP) targeted the coal mining industry for enforcement focus, achieving dramatic gains in women's employment. Although no women were employed in the coal mining industry in 1973, by December 1980, 3,295 women were so employed.<sup>30</sup> Similarly, the OFCCP's targeting of the banking industry encouraged steady improvement in hiring and promotion practices. In 1970, 17.6 percent of bank officials and financial managers were women; by 1981 that had more than doubled to 38 percent.<sup>31</sup>

Despite the proven effectiveness of this affirmative action program, in 1985 EEOC Chair Thomas joined Edwin Meese, William Bradford Reynolds, and other White House officials in attempting to eliminate these affirmative action requirements.<sup>32</sup> Though ultimately unsuccessful, Judge Thomas' efforts to undermine this program demonstrate the degree to which he was willing to sacrifice effective enforcement tools.<sup>33</sup>

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<sup>30</sup> Examination on Issues Affecting Women in our Nation's Labor Force: Hearings before the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess. (1981)(statement of Betty Jean Hall, Coal Employment Project).

<sup>31</sup> Statement of the Women's Legal Defense Fund before the U.S. Civil Rights Commission, Consultation on Affirmative Action (March 5, 1985).

<sup>32</sup> Letter from People for the American Way to Senator Biden (February 1, 1990); "Beleaguered Agency Claims Tough Enforcement of Job Anti-Bias Laws," L.A. Times, December 15, 1985, at 24, col. 1.

<sup>33</sup> Interestingly, at the beginning of his tenure at the EEOC, Judge Thomas seemed to recognize the importance of affirmative action as a tool in achieving equal employment opportunity. An example of this support appears in his answer to an interviewer's question:

On other occasions, Judge Thomas expressed his opposition to affirmative action as a remedy. For example, Judge Thomas announced in November 1984 that the EEOC would be "moving away from goals and proportional representation in both its

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Q. Do you plan to free small firms from the obligation of filing affirmative-action plans?

A. The regulations on that proposal are still out for comment and they would apply only to firms that do business with government agencies and are monitored by the Office of Federal Contract Compliance. I can't speak for the other commissioners, but my own view is that the government should be careful in taking any steps that would lessen civil-rights enforcement or give the impression of doing so." (emphasis added)

"Job Discrimination is Still Very, Very Serious," U.S. News and World Report, March 14, 1983, at 67.

Judge Thomas also expressed support for affirmative action in an October, 1982 speech to the National Conference on Equal Employment Opportunity in the Federal Sector. He noted that "affirmative action was not created in a vacuum...affirmative action has been put in place because of [sic] minorities and women have been discriminated against in the past."

As discussed in the text, this attitude soon gave way to outright opposition to such affirmative action plans.

conciliation efforts and court-approved settlements."<sup>34</sup> In 1985, he wrote:

The federal enforcement agencies. . . turned the statutes on their heads by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables. . . . As Chairman of the EEOC, I hope to reverse this fundamentally flawed approach to enforcement of the anti-discrimination statutes.<sup>35</sup>

Indeed, Judge Thomas made good on his promise. In the fall of 1985, the EEOC acting general counsel, with Judge Thomas' support, ordered EEOC regional attorneys not to include goals and timetables in settlement proposals or other actions in which the EEOC had intervened. The general counsel also ordered legal staff not to seek enforcement of goals and timetables in existing

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<sup>34</sup> "Policy Changes, Aggressive Enforcement, Will Mark Next Term at EEOC, Thomas Says," 222 Daily Lab. Rep. (BNA) at A-6 (November 15, 1984). Judge Thomas' basis for that policy change was the Supreme Court's June, 1984, decision in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, in which the Court invalidated a court-ordered affirmative action plan that interfered with an established seniority system in determining the order of layoffs. But Stotts did not require the abandonment of all race- and gender-conscious relief by the EEOC. Indeed, Judge Thomas himself had, in August, 1984, interpreted Stotts as "not requir[ing] the EEOC to reconsider its stated policies with respect to the availability of numerical goals and similar forms of affirmative, prospective relief in Title VII cases." Letter from People for the American Way to Senator Biden at 4 (February 1, 1990).

<sup>35</sup> See Office of Management and Budget, Regulatory Program of the United States Government at 523 (February, 1985), reprinted in Majority Staff of the Committee on Education and Labor, U.S. House of Representatives, "A Report on the Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission," 99th Cong., 2d Sess. at Appendix E (1986) (hereafter "Ed. and Lab. Comm. Rept. on Civil Rights Enforcement").

consent decrees.<sup>36</sup> In short, Judge Thomas deliberately chose not to seek all remedies available to victims of employment discrimination.

After a series of 1986 Supreme Court decisions reaffirmed the use of goals and timetables,<sup>37</sup> Judge Thomas pledged to abide by those rulings in seeking all available remedies in the future. Indeed, at hearings on his reconfirmation as EEOC chair, Judge Thomas promised to withdraw the policy eliminating the use of goals and timetables as a remedy.<sup>38</sup> Nonetheless, even after the Supreme Court reaffirmation, he continued publicly to express his objections to affirmative action. Indeed, Judge Thomas attacked virtually the entire body of Supreme Court jurisprudence in this area in various published articles, speeches, and interviews.

For example, Judge Thomas objected to the Court's 1987 ruling in Johnson v. Transportation Agency, Santa Clara

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<sup>36</sup> Ed. and Lab. Comm. Rept. on Civil Rights Enforcement at 11. Members of Congress whose committees had EEOC oversight responsibility wrote to Chairman Thomas to object to this policy change. See Letter to Clarence Thomas (December 6, 1985) in Ed. and Lab. Comm. Rept. on Civil Rights Enforcement at Appendix H.

<sup>37</sup> Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986); Local 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986); Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986).

<sup>38</sup> See Nomination of Clarence Thomas of Missouri to be Chairman of the Equal Employment Opportunity Commission: Hearing Before the Senate Committee on Labor and Human Resources, 99th Cong., 2d Sess. (1986) (statement of Clarence Thomas, Chairman, EEOC).

County,<sup>39</sup> a case that specifically dealt with measures that expand equal employment opportunity for women. There the Court considered a county's voluntary affirmative action plan that was instituted in response to evidence that women were under-represented in the county's workforce in certain, generally well-paying, job categories. The Court upheld the county's plan, which authorized the consideration of gender or ethnicity as a factor when choosing among qualified candidates for jobs in which members of such groups were poorly represented. Despite the clear implications of such plans for ensuring equal opportunity to qualified women, Judge Thomas criticized the Court's decision:

It's just social engineering, and we ought to see it for what it is. I don't think the ends justify the means, and we're standing the principle of nondiscrimination on its head -- it's simple as that -- and we're standing the legislative history of Title VII on its head.<sup>40</sup>

The "ends" here, of course, are simply to create opportunity for women and people of color where none before existed. And, as noted earlier, Title VII explicitly authorizes the use of affirmative action.

Judge Thomas also criticized the Court's 1980 decision in Fullilove v. Klutznick,<sup>41</sup> which held that Congress has the power to pass remedial legislation to correct past

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<sup>39</sup> 480 U.S. 616 (1987).

<sup>40</sup> "Anger and Elation at Ruling on Affirmative Action," N.Y. Times, March 29, 1987, at D1, col. 1.

<sup>41</sup> 448 U.S. 448 (1980).

discrimination. In Fullilove, the Court considered the constitutionality of a congressionally enacted set-aside program designed to remedy historic racial disparities in the construction industries. The Court upheld Congress' legislative response to evidence that minority business enterprises were denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Nonetheless, Judge Thomas criticized the decision, claiming that "the Court reinterpret[ed] civil rights laws to create schemes of racial preference where none was ever contemplated."<sup>42</sup>

Judge Thomas also attacked as "egregious"<sup>43</sup> the Court's decision in United Steel Workers v. Weber.<sup>44</sup> There the Court upheld a voluntary affirmative action plan collectively bargained to correct "traditional patterns of racial segregation and hierarchy"<sup>45</sup> in apprenticeship programs that denied equal opportunity in the form of well-paid, skilled jobs to people of color. Judge Thomas further expressed his "personal disagreement"<sup>46</sup> with Local 28 of the Sheet Metal Workers

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<sup>42</sup> Thomas, "Civil Rights as Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years 391, 396 (D. Boaz, ed. 1988).

<sup>43</sup> Id.

<sup>44</sup> 443 U.S. 193 (1979).

<sup>45</sup> Id.

<sup>46</sup> Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" 5 Yale Law and Public Policy Review 402, n.2, 403 (1987).

International v. EEOC,<sup>47</sup> which affirmed court-ordered affirmative action as a remedy for long-standing discrimination; and with United States v. Paradise,<sup>48</sup> which approved a one-black-for-one-white promotion requirement for state troopers in Alabama after the state was found guilty of blatant resistance to a court order to integrate.

By expressing opposition to affirmative action -- even when upheld by the Supreme Court as a remedy for egregious discrimination -- Judge Thomas' statements as head of the EEOC undermined the agency's credibility and effectiveness in enforcing the law. Moreover, his willingness to reject and undercut those legal principles leaves little reason to hope that he would afford them any more respect from the Supreme Court.

As EEOC chair, Judge Thomas proposed to weaken federal guidelines that set standards for employee selection practices in contravention of prevailing law.

In 1984 and 1985, Judge Thomas proposed significant changes that would have weakened key federal employment rules -- the Uniform Guidelines on Employee Selection Procedures. The Guidelines are designed to help employers in the public and private sectors comply with federal anti-discrimination laws when implementing tests and selection procedures for hiring and

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<sup>47</sup> 478 U.S. 421 (1986).

<sup>48</sup> 480 U.S. 149 (1987).

promotion. Jointly drafted and issued in 1978 by the EEOC, Department of Justice, Department of Labor, and Civil Service Commission (now the Office of Personnel Management),<sup>49</sup> the Guidelines play a key role in articulating standards for employment decisions and guide employers' decisions in implementing those standards.<sup>50</sup>

The Guidelines are based on Griggs v. Duke Power Co.,<sup>51</sup> a unanimous 1971 decision by the Supreme Court. Under Griggs, employment criteria that have a significantly disparate impact on women or people of color are prohibited -- even in the absence of discriminatory intent -- unless the employment criteria are shown to be job-related. This ruling has been critical in removing artificial barriers that have historically limited job opportunities for women and people of color. For example, minimum height and weight requirements for years excluded women from nontraditional occupations such as police officers, firefighters, and truck drivers. Because such practices have a demonstrably discriminatory impact on women, they are invalid under Griggs unless shown to be job-related. Although a recent Supreme Court decision has shifted the burden of proving job-relatedness from the employer to the employee,<sup>52</sup> another key

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<sup>49</sup> 29 C.F.R. § 1607.1 (1991).

<sup>50</sup> Letter from People for the America Way to Senator Biden (February 1, 1990).

<sup>51</sup> 401 U.S. 424 (1971).

<sup>52</sup> Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

Griggs holding -- that statistical evidence may be used to show the discriminatory effects of employment practices -- remains intact.

As EEOC chair, Judge Thomas repeatedly argued that Griggs places undue reliance on statistical evidence as proof of discrimination and that disparate impact theory was "conceptually unsound."<sup>53</sup> According to Judge Thomas, the Guidelines' adherence to Griggs encourages "too much reliance on statistical disparities as evidence of employment discrimination"<sup>54</sup> -- this despite years of experience that proved the Griggs principle both workable and successful.

In late 1984 and 1985, Judge Thomas took his disagreement with Griggs a step further. He proposed altering the Guidelines to de-emphasize the use of statistical evidence, despite the fact that there had been no change in Griggs or in any statutory or case law upon which the Guidelines were based. Judge Thomas told one interviewer that changing the Guidelines was the "first thing on my agenda."<sup>55</sup> After key Members of Congress criticized the

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<sup>53</sup> Office of Management and Budget, Regulatory Program of the United States Government (February, 1985), reprinted in Ed. and Lab. Comm. Rept. on Civil Rights Enforcement at Appendix E.

<sup>54</sup> "Changes Needed in Federal Rules on Discrimination," N.Y. Times, December 3, 1984, at A1.

<sup>55</sup> "EEOC Chairman Questions Job Bias Guidelines," Assoc. Press, December 5, 1984.

Commission for failing to follow Title VII precedent,<sup>56</sup> Judge Thomas withdrew his proposal to weaken the Guidelines.<sup>57</sup>

Though never implemented, Judge Thomas' proposal provides yet another example of his preference for restricting equal opportunity laws and his willingness to permit his opinions about prevailing law to override his obligation to enforce that law. This behavior gives us little reason to entrust the interpretation of these vital legal principles to him as a member of the Supreme Court.

As EEOC chair, Judge Thomas refused to perform his duties as required by law to enforce and evaluate the anti-discrimination efforts of federal agencies.

Judge Thomas' disagreement with affirmative action programs influenced EEOC policy in other areas as well. Under his leadership, the EEOC abdicated its responsibility to evaluate and ensure effective anti-discrimination efforts by other federal agencies.

With over three million civilian employees, the federal government is the nation's largest employer. Nearly half of the government's workers are women and more than a quarter are people

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<sup>56</sup> Ed. and Lab. Comm. Rept. on Civil Rights Enforcement at VII.

<sup>57</sup> Letter from People for the American Way to Senator Biden (February 1, 1990).

of color.<sup>58</sup> The government's employment policies -- and its willingness to police its own efforts to ensure equal employment opportunity -- set standards that affect the attitudes and practices of employers nationwide.

Indeed, all federal agencies are required by law<sup>59</sup> to provide the EEOC with goals and timetables for hiring and promoting women and people of color. These plans must contain a profile of the current agency workforce, an analysis of any barriers to employment opportunities, and a plan for removing the barriers so the agency can better achieve equal employment opportunity. The EEOC is required to review these plans to ensure that the agencies adopt effective anti-discrimination programs.

However, when several agencies, including the Departments of Justice and Education, refused to comply with this directive, Judge Thomas acquiesced in their noncompliance, claiming that he did not have the power necessary to enforce them.<sup>60</sup> But when

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<sup>58</sup> Office of Personnel Management, "Annual Report to Congress on the Federal Equal Opportunity Recruitment Program Fiscal Year 1990" (January, 1991).

<sup>59</sup> Section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b), requires each federal agency to prepare national and regional equal employment opportunity plans in order to "maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment." The regulations promulgated pursuant to Section 717(b) are found at 29 C.F.R. §§ 1613.201-205.

<sup>60</sup> In response to questioning from Congresswoman Cardiss Collins regarding the refusal of the National Endowment for the Humanities (NEH) and the Department of Justice to submit goals and timetables, Judge Thomas indicated that "[t]here is nothing that I can do to NEH or to anyone who does not obey." Hearings

Congress introduced legislation to provide the EEOC with just such authority, Judge Thomas declined to support it. He said he preferred the flexibility of the current arrangement.<sup>61</sup>

Then, in 1987, Judge Thomas issued a management directive that shifted the major responsibility for implementing affirmative action plans to individual agency heads, leaving EEOC with only nominal oversight responsibilities.<sup>62</sup> By stripping the EEOC of its role as the lead enforcement agency, Judge Thomas diminished the scope of his official responsibilities in a way that undermined the enforcement of equal employment opportunity laws in federal agencies.

This provides yet another example of Judge Thomas' predilection for restrictive interpretation of equal employment opportunity law. Such an approach is disturbing indeed in a nominee to the Supreme Court who will be called upon to uphold and interpret legal protections for women, especially women of color, and disadvantaged people.

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Before the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations, National Endowment for the Humanities and the Equal Employment Opportunity Commission Hiring Policies, 98th Cong., 2d Sess. 31 (1984).

<sup>61</sup> Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor on H.R. 3330, 100th Cong., 2d Sess. (1988) (testimony of Clarence Thomas).

<sup>62</sup> "Management Directive 714" issued pursuant to Section 717(b) of Title VII of the Civil Rights Act.

Judge Thomas failed to enforce the law against sex discrimination to ban employment practices that exclude all women of child-bearing age from certain high-paying jobs.

One of the most important issues of sex discrimination arises from policies that exclude all women of child-bearing age from certain high-paying jobs unless they can prove that they are infertile. These policies are based on fears that those jobs' occupational hazards would harm women and the fetuses they might carry. Because a number of women have been sterilized to keep their hard-won jobs, these policies have been referred to as "forced-sterilization" policies; others call them "fetal protection" policies. It has been estimated that

... as many as 20 million jobs in the United States expose workers to reproductive or fetal health hazards, and employers increasingly exclude women from such jobs based on this new gender stereotype.<sup>63</sup>

For example, in 1978, the American Cyanamid Company began to exclude all women age 16 to 50 from jobs involving exposure to lead and other hazardous substances unless they could prove that they were sterile. As a result, five women in the lead pigment department obtained sterilizations to keep their jobs.

The company justified its policy by arguing that the fetuses of women exposed to lead could be harmed. Despite the company's laudable goal of protecting its employees' health, its draconian

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<sup>63</sup> Majority Staff of the Committee on Education and Labor, U.S. House of Representatives, "A Report on the EEOC, Title VII and the Workplace -- Fetal Protection Policies in the 1980s," 101st Cong., 2d Sess. 2 (1990) (hereafter, "Ed. and Lab. Comm. Rept.").

response -- excluding all fertile women because any fertile women could be pregnant at any time -- was blatant sex discrimination that did not protect employees' health. To the contrary, the policy ignored two other major health risks: the serious health problems that lead exposure causes in adult workers -- men and women; and the reproductive or genetic damage to fetuses that paternal lead exposure may cause.<sup>64</sup>

The American Cyanamid case and others like it involving intentional sex discrimination under Title VII posed a problem for the Equal Employment Opportunity Commission to resolve.<sup>65</sup> In response, the EEOC (prior to Judge Thomas' appointment) and the Department of Labor in 1980 proposed a guideline interpreting Title VII, as amended by the Pregnancy Discrimination Act of 1978, to prohibit gender-based "fetal protection" policies. This proposal rejected the argument that such policies were saved by the statutory "BFOQ" defense -- the claim that not being a fertile woman was a "bona fide occupational qualification" for jobs involving lead exposure. Instead, the EEOC proposal provided that intentional sex-based discrimination is legal only

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<sup>64</sup> Id. at 5.

<sup>65</sup> It also implicated occupational health and safety law. Indeed, the Department of Labor, which enforces the federal Occupational Safety and Health Act ("OSHA"), challenged American Cyanamid's practice as a violation of that Act as well. Judge Robert Bork, then on the U.S. Court of Appeals for the D.C. Circuit, joined by then Judge Antonin Scalia, held that American Cyanamid's adoption of an exclusionary policy that forced five women employees to become sterilized did not violate OSHA's provision that employers have a general duty to maintain hazard-free workplaces. Oil, Chemical, and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984).

when sex or pregnancy is shown to interfere with the worker's ability to perform the actual tasks of the job. Because neither fertility nor gender affects an employee's ability to perform those tasks, such forced sterilization policies would be illegal.<sup>66</sup>

Though it would have ruled that gender-based exclusionary policies are per se sex discrimination, the proposal also made clear that an employer could institute gender-neutral policies to protect all its employees from reproductive hazards.<sup>67</sup> Thus, the proposal would have encouraged employers to eliminate workplace hazards for all employees, rather than selectively and discriminatorily eliminate workers who might be susceptible to those hazards.

After receiving extensive comments on the proposal, the Commission withdrew it in 1981, preferring instead to rely on "investigation and enforcement of the law on a case by case basis" to resolve complaints of sex discrimination based on exclusionary policies involving reproductive hazards.<sup>68</sup>

Rather than resolving such complaints, however, the EEOC warehoused them. In 1982, the EEOC, under Judge Thomas, instructed its staff to forward those charges to a central Washington, D.C., office, because it had not developed a

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<sup>66</sup> As will be discussed, the Supreme Court ultimately endorsed this analysis in United Auto Workers v. Johnson Controls, Inc., 111 S.Ct. 1196 (1991).

<sup>67</sup> 45 Fed. Reg. 7514 et seq. (1980).

<sup>68</sup> 46 Fed. Reg. 3916 (1981).

comprehensive policy to deal with them.<sup>69</sup> For the next seven years, the EEOC took no action on at least 60 charges of intentional sex discrimination.<sup>70</sup>

Some of the charges that languished involved examples of discrimination that did not depend on development of a comprehensive theory for their resolution. For example, in one case in which a woman was denied a lead-exposure job, other evidence of intentional sex discrimination (including the personnel manager's observation that he "could use a pretty face in the office") established that the lead exposure was a pretext for discrimination. This case, which was filed in 1981, languished for years and was closed in 1989 because the Commission could no longer locate the charging party.<sup>71</sup> For this woman and the others who were denied or lost jobs or chose sterilization to keep them, Judge Thomas' EEOC abdicated its statutory responsibility to address their complaints of sex discrimination. And employers were left without the guidance to know which of their practices would be interpreted to violate Title VII.

In 1988, the Thomas EEOC finally issued a policy directive on the application of Title VII to policies excluding fertile

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<sup>69</sup> Ed. and Labor Comm. Rept. at 14-15.

<sup>70</sup> Id. at 2, 16. Some of the "warehoused" charges were filed as early as the 1970s. Id. at 16.

<sup>71</sup> Id. at 17-18.

women.<sup>72</sup> But that policy was plainly inconsistent with Title VII. In it, the EEOC allowed employers to rely on Title VII's BFOQ defense, even though fertile women are capable of performing the jobs from which they are excluded by such policies.<sup>73</sup> In other words,

... the EEOC watered down [discrimination] theory so that employers could successfully defend their fetal protection policies without establishing any link between such policies and job performance.<sup>74</sup>

Rather than interpreting Title VII to discourage employers from solving the problem of reproductive hazards in their workplaces by excluding women, the EEOC's 1988 policy permitted employers both to limit women's employment opportunities and to maintain workplaces in which men's exposure to health hazards continued unabated.

That Title VII interpretation was, ultimately, soundly rejected by the Supreme Court in United Auto Workers v. Johnson Controls, Inc.<sup>75</sup> All nine Justices concluded that Johnson

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<sup>72</sup> "EEOC Policy Guidance on Reproductive and Fetal Hazards," Daily Lab. Report (BNA), No. 193 at D-1 (October 5, 1988).

<sup>73</sup> The policy also expressly sanctioned sex discrimination in the evaluation of evidence of health risks: for men, inconclusive evidence would be presumed not to show a risk to them. But for women, inconclusive evidence of health risk would be presumed to show "substantial risk" to them that justified sex-based discrimination. "EEOC Policy Guidance on Reproductive and Fetal Hazards," Daily Lab. Report (BNA), No. 193 at D-2 (October 5, 1988).

<sup>74</sup> Ed. and Lab. Comm. Rept. at 3.

<sup>75</sup> 111 S.Ct. 1196 (1991).

Controls' "fetal-protection policy explicitly discriminate[d] against women on the basis of their sex,"<sup>76</sup> and that Johnson Controls had failed to establish the BFOQ defense. A majority held that the BFOQ defense is not available because "[f]ertile women...participate in the manufacture of batteries [the task of the jobs from which fertile women were excluded] as efficiently as anyone else."<sup>77</sup> The Thomas EEOC's 1988 interpretation of Title VII in this area was narrower than even the interpretation of Justices Rehnquist and Scalia.

The EEOC did begin to improve its record in this area in 1989, after inquiries by the House Education and Labor Committee. It began to resolve charges (although as of April, 1990, not all of the warehoused charges had been resolved, and many had to be closed because they were too old).<sup>78</sup> And it revised its policy interpretation to be more consistent with the language and intent of Title VII.<sup>79</sup> Nevertheless, the years of EEOC inactivity and inconsistency in such an important area of sex discrimination law -- on Judge Thomas' watch -- again demonstrate his preference for

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<sup>76</sup> *Id.* at 1202.

<sup>77</sup> *Id.* at 1207.

<sup>78</sup> Ed. and Lab. Comm. Rept. at 16.

<sup>79</sup> In fact, in 1990 the EEOC issued a new policy directive that interpreted Title VII more faithfully than its 1988 policy had done, and was much more in line with the Supreme Court's ultimate interpretation. The EEOC also urged the Department of Justice not to file a brief on the side of the employer in the Seventh Circuit appeal of the Johnson Controls case. Ed. and Lab. Comm. Rept. at 26-29.

restrictive applications of the laws that protect women, including women of color, from unlawful discrimination.

Judge Thomas failed to challenge gender-based wage discrimination under Title VII and the Equal Pay Act.

Although the status of women in the labor market has improved in some ways, they remain clustered in predominantly "female jobs" -- secretaries, file clerks, teachers, and nurses. These jobs are invariably less well compensated than jobs held by white males. Women of color -- in particular, black women -- tend to be "crowded" in the lower paying jobs within female-dominated jobs.<sup>80</sup> Even where women perform the same jobs as men, they may be paid less.

The federal civil rights laws provide ample tools for the redress of discrimination in compensation. The Equal Pay Act of 1963<sup>81</sup> prohibits gender-based pay differentials in jobs that are equal or substantially equal. And, the Supreme Court in Gunther v. County of Washington<sup>82</sup> held that Title VII forbids intentional gender-based wage discrimination in jobs that may not be substantially equal.

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<sup>80</sup> J. Malveaux, "Low Wage Black Women: Occupational Descriptions, Strategies for Change," (unpublished paper prepared for the NAACP Legal Defense and Education Fund, Inc. 1984).

<sup>81</sup> 29 U.S.C. § 206(d).

<sup>82</sup> 452 U.S. 161 (1981).

Before 1981, the EEOC took the initiative in the area of wage discrimination by filing amicus briefs in important cases,<sup>83</sup> by conducting hearings on wage discrimination in the workplace, and by commissioning a National Academy of Sciences study.<sup>84</sup> However, the EEOC under Judge Thomas did little in this area of equal employment opportunity law. On September 15, 1981, the Commission began on a relatively positive note by issuing a 90-day notice to provide "interim guidance" in the processing of gender-based wage claims under Title VII and the Equal Pay Act. This "interim policy" was renewed regularly until 1985.<sup>85</sup> While the policy was in effect, there was evidence

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<sup>83</sup> The EEOC was amicus curiae to the plaintiffs in Gunther, and was also amicus in IUE v. Westinghouse, 631 F. 2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981). In IUE, the Third Circuit found that, even though job classifications were not substantially equal, women in predominantly female job classifications could still compare their wages to wages paid to males in predominantly male job classifications. The employer in this case had relied on a job evaluation system to determine the relative worth of jobs at its facilities. Even though male and female job classifications received the same point rating, wage rates for predominantly female job classifications were deliberately set lower than wage rates for predominantly male job classifications.

<sup>84</sup> The study was published as Women, Work and Wages: Equal Pay for Jobs of Equal Value (H. Hartmann & D. Treiman ed. 1981).

<sup>85</sup> "Notice Adopted by the Equal Employment Opportunity Commission to Provide Interim Guidance to Field Offices on Identifying and Processing Sex-Based Wage Discrimination Charges Under Title VII and the Equal Pay Act." According to the notice, charges were to be investigated thoroughly. Investigators were directed to seek out evidence concerning a variety of factors, including: 1) a breakdown of the employer's workforce by gender; 2) information about wage schedules; 3) where relevant, copies of any available analyses of job evaluations systems; and 4) where the market was the basis for the gender-based disparity, information about how the employer determined the market rate.

that wage discrimination charges were mishandled or were not investigated at all. Wage discrimination charges forwarded to Washington, D.C., languished there.<sup>86</sup> At one of several oversight hearings on wage discrimination, Judge Thomas testified that approximately 266 such charges were pending without resolution.<sup>87</sup>

The EEOC issued an official policy on gender-based wage discrimination under Title VII in the summer of 1985.<sup>88</sup> The charge involved claims by female employees of the Rockford, Illinois, Housing Authority that the employer paid its administrative staff (85 percent female) less than its maintenance staff (88 percent male), even though the duties

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The policy identified several issues which were to be considered "non-CDP" (non-Commission Decision Precedent); that is, cases involving those issues were to be sent to Washington. Among the issues were "claims of sex-based wage discrimination brought under Title VII that may be based on the concept sometimes referred to as 'comparable worth.'"

<sup>86</sup> H.R. Rep. No. 98-796, 98th Cong., 2d Sess. (1984).

<sup>87</sup> Equal Employment Opportunity Commission Handling of Pay Equity Cases: Hearings Before the Manpower and Housing Subcommittee of the House Committee on Government Operations, 98th Cong, 1st Sess. (1984) (statement of Clarence Thomas, Chairman of the EEOC). In a response to the Subcommittee report on the hearings, the Commission indicated that the charges were not languishing in Headquarters; rather, the Commission was engaged either in active consideration of a number of the charges, or was requesting additional information before determining what to do. Response of the Chairman of the Equal Employment Opportunity Commission To the Committee on Government Operation's Thirty-Ninth Report, "Pay Equity: EEOC's Handling of Sex-Based Wage Discrimination Complaints", at 6. (August 1984). We have no information regarding the final disposition of those charges.

<sup>88</sup> EEOC No. 85-8, 37 FEP Cases 1889 (BNA) (June 17, 1985).

performed by the women required equal or more skill, effort, and responsibility than those performed by men. The female employees also charged that the employer intentionally set wage increases for female-dominated jobs at lower levels than the prevailing rate of increase for such jobs in local municipal agencies, while giving men wage increases that equaled the prevailing rate for their jobs.

The Commission found that the complainants did not have a Title VII claim because they had not alleged or provided any evidence that women's access to jobs in the higher paid male job classifications was limited, or that the classifications compared involved work that was similar in skill, effort, responsibility, and working conditions. The Commission noted that "the mere predominance of individuals of one sex in a job classification is not sufficient to create an inference of sex discrimination in wage setting." The claim appeared to be a "comparable worth" claim, according to the Commission.<sup>89</sup> The Commission relied on the Gunther definition of "comparable worth" claims as those involving "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."<sup>90</sup>

The Commission followed Gunther in its determination that Title VII covers gender-based wage discrimination cases where there is evidence of intentional discrimination. That was no

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<sup>89</sup> Id. at 4.

<sup>90</sup> Gunther, supra, 452 U.S. at 166.

surprise. What is troubling is the Commission's decision to interpret Gunther as restrictively as it did -- to designate all charges where there appears to be no evidence of intentional discrimination as "comparable worth" claims not within the jurisdiction of the EEOC without investigating them. Such a designation is circular and guarantees that many potential wage discrimination cases never get investigated.

Of equal concern are the statistics indicating the reduction of Commission filings of straightforward Equal Pay Act cases. These statistics indicate that the Commission paid scant attention to a viable and undisputed avenue for challenging discrimination in compensation. Fifty Equal Pay Act cases were filed in fiscal year 1980. While Judge Thomas chaired the Commission, the number of Equal Pay Act cases filed by the agency dropped: in fiscal year 1984, 9 cases were filed; in FY 1985, 10; FY 1986, 12; FY 1987, 12; FY 1988, 5, and in FY 1989, 7 cases.<sup>91</sup> These figures, coupled with the restrictive

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<sup>91</sup> Women Employed Institute, EEOC Enforcement Statistics (1991). We note that these statistics also include a line in the section on litigation labelled "concurrent," after listings for Title VII, Equal Pay, and Age Discrimination cases. We can assume that those numbers may reflect cases filed concurrently under Title VII and the Equal Pay Act. Thus the number of Equal Pay cases filed increased as follows (for the years for which there are "concurrent" statistics): in fiscal year 1984, there were 17 concurrent cases filed, for a possible total of 26 Equal Pay cases for that year; in FY 1985, 8 concurrent cases filed, for a total of 18 Equal Pay cases; in FY 1986, 17 concurrent cases filed, for a total of 29 Equal Pay cases; in FY 1987, 29 concurrent cases filed, for a total of 41 Equal Pay cases; in FY 1988, 24 concurrent cases filed, for a total of 29 Equal Pay cases for that year; and in fiscal year 1989, 27 concurrent cases filed, for a total of 34 Equal Pay cases filed the final year that Judge Thomas was chair of the Commission. Even if all

interpretation given by the Commission to Title VII wage discrimination lawsuits, give rise to serious concerns regarding Judge Thomas' commitment to securing equal employment opportunity for women.

Judge Thomas failed to enforce federal age discrimination law and consistently took policy positions against the interests of the older workers he was sworn to protect.

Due to dramatic demographic shifts in the American population, older Americans represent the fastest growing segment of the population. Our labor force relies more and more upon the labor of its older workers, many of whom are women.<sup>92</sup> To ensure fairness for these workers, Congress in 1967 enacted the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against older workers.

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"concurrent" cases filed are Title VII/Equal Pay cases, the totals reflect a drop in litigation which remains cause for concern.

<sup>92</sup> By the year 2000, approximately one in three working women will be midlife or older. Older women workers are especially vulnerable to both age and sex discrimination. For example, the median earnings of midlife and older women who work full time year-round are less than two-thirds that of men; women over 64 earn only 58 percent of the wages paid to men of the same age. Older women in particular are segregated into low-paying jobs. Fifty-eight percent of all employed women over age 45 work in sales, clerical, or service occupations; 62 percent of women over 55 work in these fields. Older black women feel the discriminatory effects of race as well: black women over 55 are three times more likely than white women to work in service occupations, while nearly one-third of those over 65 work as private household workers. Older Women's League, Paying for Prejudice: A Report on Midlife and Older Women in America's Labor Force (1991).

Under Judge Thomas' leadership, the EEOC allowed thousands of ADEA charges filed by older workers to exceed the two-year statute of limitations. Once this statute is exceeded, the charges "lapse" and the workers lose their right to pursue their claims in court and to receive remedies for proven discrimination.

In response to congressional inquiry about the severity of the problem, Judge Thomas consistently underestimated the number of charges that had lapsed. At first, he reported that only 78 cases had lapsed; later he revised that figure to approximately 900, then to 1,600, and then to over 9,000. On May 1, 1989, Judge Thomas informed the Senate Committee on Aging that approximately 13,000 age discrimination claims had been allowed to expire.<sup>93</sup>

To remedy this crisis and to protect the older workers involved, in 1988 Congress enacted the Age Discrimination Claims Assistance Act (ADCAA) to extend temporarily the filing period for these workers and to require the EEOC to notify those affected. Yet even after the problem was publicly identified and corrective legislation enacted, the EEOC continued to let age discrimination charges lapse. At his confirmation hearings for the D.C. Circuit, Judge Thomas admitted that thousands of additional claims had lapsed since enactment of the ADCAA -- claims that were not covered by the filing extension created by

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<sup>93</sup> Letter from People for the American Way to Senator Biden (February 1, 1990).

the ADCAA because they occurred after April 1, 1988.<sup>94</sup> When asked to explain the continuation of this problem, Judge Thomas blamed the state and local fair employment agencies with which the EEOC contracts to handle processing of many federal employment claims.<sup>95</sup> Remarkably, he further asserted that the lapsing of the federal claims was not significant because the workers involved were still left with state claims, which are not subject to the two-year statute of limitations.<sup>96</sup> He further claimed that the EEOC was not necessarily involved with or responsible for ADEA claims filed with state or local enforcement agencies.

Judge Thomas' testimony on this issue is enormously troubling. As any lawyer should be well aware, the loss of a federal claim because the statute of limitations has expired is a very serious matter. A state law claim in no way substitutes for federal rights. Congress enacted the ADEA to provide older workers with a federal cause of action in federal court; state age discrimination laws often provide more limited relief than that available under federal law.<sup>97</sup>

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<sup>94</sup> Hearings on the Nomination of Clarence Thomas to the United States Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 189-90 (1990) (hereafter "Hearings on the Nomination of Clarence Thomas").

<sup>95</sup> Id. at 190-91.

<sup>96</sup> Id. at 192-93.

<sup>97</sup> For example, the ADEA permits a private right of action 60 days after filing an administrative claim, jury trials, liquidated damages, and attorney's fees for a prevailing

Furthermore, the existence of a state claim in no way diminishes the EEOC's obligation to enforce older workers' rights under federal law. As the head of the EEOC should well know, the EEOC may contract with a state or local agency to serve as its agent in receiving and processing complaints. The EEOC remains responsible for ensuring that federal charges are handled and investigated in a timely manner, including monitoring its agents' work in handling such matters.

Not only did Judge Thomas fail to enforce age discrimination law, he also often took policy positions that were damaging to the economic interests of older workers. While the EEOC during Judge Thomas' early years did in fact take some positions supportive of older women workers, as in Norris v. Arizona Governing Committee<sup>98</sup> and EEOC v. Newport News Shipbuilding & Dry Dock Co.,<sup>99</sup> the EEOC's policy positions for the remainder of Judge Thomas' tenure too often hurt older workers' economic security.

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plaintiff; many states do not. See Letter from American Association of Retired Persons to Senator Biden (February 16, 1990).

<sup>98</sup> 671 F.2d 330 (9th Cir. 1982), *aff'd*, 463 U.S. 1073 (1983). In Norris, the EEOC successfully urged the Court that Arizona violated Title VII by establishing a pension plan for state employees that paid lower monthly benefits to retired women than to men.

<sup>99</sup> 462 U.S. 669 (1983). In Newport News, the EEOC urged that an employer violates Title VII's Pregnancy Discrimination Act by providing a health insurance plan for workers and their families that covers spouses' pregnancy-related costs less favorably than costs resulting from other spousal illness and injuries.

For example, the EEOC under Judge Thomas' leadership failed to rescind regulations that allowed employers to stop contributions to employees' pension accounts when employees continued to work past age 65, despite the EEOC's own determination that such regulations violated the ADEA.<sup>100</sup> The EEOC's failure to rescind the unlawful regulations was estimated to cost older workers \$450 billion in lost pension benefits annually.<sup>101</sup> Congress was finally forced in 1986 to pass legislation that explicitly prohibited employers from cutting off pension accruals, contributions, and credits for workers who reach age 65.<sup>102</sup>

Second, Judge Thomas promulgated regulations that increased older workers' vulnerability to coercion by employers to relinquish their legal rights. Prior to 1987, an employer could ask an employee to waive her rights under the ADEA only with the approval of the EEOC. The EEOC under Judge Thomas promulgated regulations that allowed employers to solicit such waivers without the supervision of the EEOC. Even though Congress

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<sup>100</sup> Hearings on the Nomination of Clarence Thomas at 185-87. When confronted by Senator Metzenbaum about the failure to rescind the regulations, Judge Thomas claimed that federal rulemaking requirements and the actions of other agencies prevented the EEOC from rescinding the illegal regulations. However, the EEOC's acting legal counsel at the time had advised the EEOC that federal law permitted the rescission. Id.

<sup>101</sup> Letter from People for the American Way to Senator Biden (February 1, 1990).

<sup>102</sup> Congress amended the ADEA as part of the Omnibus Reconciliation Act of 1986. B. Fretz & D. Shea, "Age Discrimination," One Nation Indivisible: Report of the Citizen's Commission on Civil Rights 185 (1989).

suspended these regulations in fiscal years 1988, 1989, and 1990, the EEOC refused to withdraw or modify them.<sup>103</sup> Again, Judge Thomas' willingness to interpret the law to the detriment of older workers' rights casts doubt upon his commitment to uphold these laws from the Supreme Court.

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<sup>103</sup> B. Fretz & D. Shea, One Nation Indivisible, at 186.

**CONSTITUTIONAL PROTECTIONS AGAINST SEX DISCRIMINATION**

For the last 20 years, the Supreme Court has consistently held that sex-based distinctions in the law require careful scrutiny under the Fourteenth Amendment's Equal Protection Clause.<sup>104</sup> The Court has recognized that such scrutiny is necessary since "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."<sup>105</sup>

Without question, the Court's commitment to equal protection analysis has proved critically important in battling sex discrimination. As New York University School of Law professor Sylvia Law has testified:

The Supreme Court's recognition that gender discrimination is presumptively wrong has had a tremendously positive impact on the lives of women in this country. Under the Court's direction, the federal courts have invalidated dozens of laws excluding women from wage work and public life and devaluing the wages and benefits they receive.<sup>106</sup>

Indeed, the Equal Protection Clause provides the primary constitutional protection against laws that discriminate on the basis of gender. At a minimum, any nominee to the Supreme Court

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<sup>104</sup> See Mississippi University for Women v. Hogan, 458 U.S. 718 (1987); Craig v. Boren, 429 U.S. 190 (1976).

<sup>105</sup> Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

<sup>106</sup> Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 2361 (1987) (statement of Sylvia A. Law, Professor of Law, New York University).

must demonstrate his or her adherence to these most basic guarantees against invidious sex-based discrimination.

- o Judge Thomas' seeming indifference to the Equal Protection Clause is troubling, as the Equal Protection Clause has been interpreted as the primary source of constitutional protections against sex discrimination;
- o Judge Thomas has not stated how or whether he would apply a natural rights analysis to sex discrimination; historically, though, natural law principles have been used to limit the lives and opportunities of women; and
- o Judge Thomas himself has embraced an analysis of the status of working women that denies the reality of discrimination in women's lives and its effects on their economic security and individual opportunity.

Each concern is discussed in greater detail below.

Judge Thomas' seeming indifference to the Equal Protection Clause is troubling, as the Equal Protection Clause has been interpreted as the primary source of constitutional protections against sex discrimination.

Judge Thomas' public record on constitutional issues of bedrock importance to women is surprisingly thin. He has not issued any opinions that touch upon equal protection issues during his short tenure on the federal bench. Nor, it seems, during almost eight years as head of the EEOC, did Judge Thomas comment on constitutional protections against sex discrimination.

Judge Thomas' analysis of sex-based constitutional claims received only a passing mention at his confirmation hearings for the D.C. Circuit Court of Appeals. When asked by Senator Kohl about an equal protection challenge to a publicly-funded military academy's policy of excluding women from admission, Judge Thomas

declined to answer on the grounds that he might have to rule on such a case as an appellate judge. In responding, however, Judge Thomas failed to mention the constitutional implications of the case. Instead, he discussed it only as a possible violation of statutory law -- inaccurately identifying Title VI of the Civil Rights Act as the legal standard to be applied<sup>107</sup> -- and not as an equal protection challenge.<sup>108</sup> Judge Thomas' apparent

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<sup>107</sup> In fact, Title VI of the Civil Rights Act prohibits discrimination on the basis of race -- but not sex -- by any program that receives federal funds, including educational institutions. In light of his experience as Assistant Secretary for Civil Rights in the Department of Education, Judge Thomas' misapplication of Title VI to the case at hand is surprising, to say the least.

<sup>108</sup> Senator Kohl: I would like to ask you about a controversy that has been in the newspapers recently. In Virginia, there is a military academy known as VMI; which educates young men but admits no women. Without commenting on the specific case, I would like to know your views in this kind of situation.

Mr. Thomas: Well, that is exactly the kind of case, Senator, or similar case that could come before a circuit court at some point, since I would assume that the alleged violation is of title VI of the Civil Rights Act of 1964. And having been the Assistant Secretary for Civil Rights in the Department of Education, I know that it would take some time for those kinds of cases to find their way through courts and I think it would be inappropriate for me to prejudge it at any point, but certainly in the context of a confirmation hearing to sit on the court of appeals.

Senator Kohl: In general, do you think that a publicly funded military academy should be allowed to exclude women?

Mr. Thomas: Again, the allegation there in that matter is in court, even as we speak, is that this is a violation of title VI of the Civil Rights Act of 1964, which I enforced as the Assistant Secretary for Civil Rights. I abhor discrimination. The constraint that I am

failure to recognize the fundamental constitutional implications of the case -- regardless of his judgment as to how it should be decided -- raises serious concern about his understanding of and commitment to well-established constitutional protections against sex discrimination.

Judge Thomas had another opportunity to articulate his commitment to the Fourteenth Amendment's guarantees against sex discrimination when asked by Senator DeConcini to discuss his views "of the proper application of the constitutional doctrine of equal protection." Judge Thomas replied:

As an appellate court judge, I am duty bound to follow and apply Supreme Court precedent to cases which might come before me. In interpreting the equal protection clause, the Supreme Court has set out essentially three standards of review, strict scrutiny, intermediate review, and rational review. Though I do not have a fully developed Constitutional philosophy, I have no personal reservations about applying these standards as an appellate court judge in cases which might come before me.<sup>109</sup>

Judge Thomas' recitation that he would be bound to follow Supreme Court precedent as an appellate court judge provides little insight into how he would evaluate equal protection cases as a Supreme Court Justice -- a position that would enable him to deviate from established precedent and create new case law. Nor

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operating under is that we are looking at an alleged statutory violation which will wind its way through the courts and could eventually, not necessarily the D.C. circuit, but could eventually be before a court of appeals, if I understand the intensity of that battle.

Hearings on the Nomination of Clarence Thomas at 56-57.

<sup>109</sup> Id. at 386.

does his disclaimer that he does "not have a fully developed Constitutional philosophy" (reiterated at least one other time during his confirmation hearings)<sup>110</sup> offer any reassurances as to his commitment to equal protection. Indeed, his long-standing support for "natural rights" analysis suggests that he does indeed have a constitutional philosophy, one that could threaten women's constitutional rights.

Although Judge Thomas has written several articles that discuss constitutional protections against race-based discrimination, none address the standards and analysis to be applied in evaluating gender-based claims. In fact, Judge Thomas has at times downplayed the use of the Equal Protection Clause as a tool for eradicating invidious discrimination.<sup>111</sup>

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<sup>110</sup> Id. at 56.

<sup>111</sup> For example, Judge Thomas agrees with the result in the Supreme Court's decision in Brown v. Board of Education -- that state-imposed school segregation is constitutionally repugnant -- but takes issue with the Court's equal protection analysis in reaching that result. Judge Thomas asserts that Brown was a "missed opportunity" to apply higher law analysis, identifying Brown's "great flaw" as its reliance on empirical evidence of the effects of segregation without recognizing that segregation was a derivative of slavery and thus "at fundamental odds with the founding principles." Thomas, "Toward a 'Plain Reading' of the Constitution," 30 Howard Law Journal 691, 698-99 (1987).

In particular, Judge Thomas has argued that the Brown case would have been better decided had it relied on the analysis used by Justice Harlan in dissent in Plessy v. Ferguson, the 19th-century case which upheld the doctrine of "separate but equal." In praising Harlan's analysis, he concludes that Harlan "relied on the Privileges or Immunities Clause rather than on either the Equal Protection or the Due Process Clause." Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63, 66-68 (1989). Judge Thomas' seeming indifference to the Equal Protection Clause provides cause for concern, since the

Hence, the resultant uncertainty as to his views on constitutional protections against sex discrimination, coupled with his expressed support for jurisprudence based on "natural rights" theory, raises substantial concern about his adherence to the Constitution's most basic guarantees against invidious sex discrimination.

Judge Thomas has not stated how or whether he would apply a natural rights analysis to sex discrimination; historically, though, natural law principles have been used to limit the lives and opportunities of women.

Judge Thomas has consistently reiterated in writings and speeches his support for a "higher law" or "natural rights" theory of constitutional law. This theory argues that legal principles must be measured against the standards of a natural law that reflects humankind's highest values and aspirations.<sup>112</sup>

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Equal Protection Clause has been interpreted as the primary source of constitutional protections against sex-based discrimination.

<sup>112</sup> This higher law is often -- but not always -- informed by reference to religious values. For example, in articulating natural law theory, Judge Thomas, quoting John Quincy Adams, has asserted:

"Our political way of life is by the laws of nature of nature's God, and of course presupposes the existence of God, the moral ruler of the universe, and is a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government."

As a theory of jurisprudence to be applied by the Supreme Court, natural rights analysis provides cause for serious concern. Its reliance on "higher" moral principles leaves open the dangerous possibility that cases will be decided on the basis of individual judges' musings, intuitions, or religious beliefs. These personal conclusions are bound to vary unpredictably from Justice to Justice.<sup>113</sup> As one Supreme Court Justice wrote in dissenting from the Court's natural rights analysis in a 1798 probate case: "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject..."<sup>114</sup> Then, as now, the notion that personal moral beliefs can trump bedrock legal principles is cause for alarm among members of a diverse, democratic society.

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Address by Clarence Thomas, "Why Blacks Should Look to Conservative Policies," The Heritage Foundation (June 18, 1987) at 9.

Judge Thomas, paraphrasing St. Thomas Aquinas, has further explained that "an unjust law is a human law that is not rooted in eternal law and natural law" and that "a just law is a man-made code that squares with the moral law or the law of God." Thomas, "Affirmative Action: Cure or Contradiction?" The Center Magazine, November/December 1987, at 21.

<sup>113</sup> To the extent that these values are informed by a Justice's religious beliefs, the use of natural rights theory raises critical questions about the separation of church and state. And, since religions vary tremendously in identifying life's fundamental values -- as do even varying denominations of the same religion or church -- the application of natural rights theory will similarly vary depending upon the religious affiliation of the Justice involved.

<sup>114</sup> Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (Iredell, J., dissenting).

In numerous articles and speeches, Judge Thomas has applied natural rights theory to conclude that state-imposed racial discrimination is constitutionally prohibited, not necessarily by the Fourteenth Amendment's Equal Protection Clause, but by the "higher law" principles articulated in the Declaration of Independence.<sup>115</sup> Indeed, his application of natural rights theory leads him to a powerful condemnation of race-based segregation. However, since his natural rights analyses have been directed almost exclusively to race-based discrimination, it is not clear whether Judge Thomas would apply this analysis to claims of discrimination against women, including women of color.

Judge Thomas' support for natural rights analysis raises substantial questions about the theory's application to gender discrimination.<sup>116</sup> Historically, the language of natural rights and higher law has been used to limit women's lives and opportunities. For example, an 1873 Supreme Court decision denied a woman a license to practice law, arguing that

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<sup>115</sup> More specifically, Judge Thomas has argued that racial segregation is unconstitutional because the Constitution is intimately linked to the Declaration of Independence, which makes clear that the United States is premised "the promise of equality of rights." Thomas, "Toward a 'Plain Reading' of the Constitution -- The Declaration of Independence in Constitutional Interpretation," 30 Howard Law Journal 691, 692 (1987).

<sup>116</sup> For example, Judge Thomas has urged that constitutional interpretation return to a "'plain reading' of the Constitution - which puts the fitly spoken words of the Declaration of Independence in the center of the frame formed by the Constitution." Thomas, "Toward a 'Plain Reading' of the Constitution -- The Declaration of Independence in Constitutional Interpretation," 30 Howard Law Journal 691, 703 (1987). The Declaration, of course, fails explicitly to mention the rights of women in its pronouncement that "all men are created equal."

...civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman is to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.<sup>117</sup>

The Court relied upon similar principles in Muller v. Oregon,<sup>118</sup> when it upheld a state statute that limited the number of hours women could work. The Muller Court held that legislation restricting women's employment was permissible because "healthy mothers are essential to vigorous offspring, [and] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."<sup>119</sup> It justified its limitations on women's opportunities by noting that "woman has always been dependent upon man."<sup>120</sup>

Reliance on "natural law" thus threatens to limit women's freedom and equality by introducing outdated notions of women's "natural" roles and capabilities into constitutional interpretation. For these reasons alone, Judge Thomas' support for natural rights theory generates considerable discomfort as to

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<sup>117</sup> Bradwell v. Illinois, 83 U.S. 130, 141-42 (1873).

<sup>118</sup> 208 U.S. 412 (1908).

<sup>119</sup> Id. at 421.

<sup>120</sup> Id.

his willingness to uphold constitutional protections against sex discrimination.

Judge Thomas has embraced an analysis of working women's status that denies the reality of discrimination in women's lives and its effects on their economic security and individual opportunity.

Judge Thomas' approval of an analysis that rejects the role that discrimination plays in limiting women's lives further fuels concern as to his willingness to abide by constitutional prohibitions against invidious sex-based discrimination. Specifically, Judge Thomas has written approvingly of academic Thomas Sowell's analysis of working women in Civil Rights: Rhetoric or Reality?<sup>121</sup> Judge Thomas praised Mr. Sowell's work as

... a useful, concise discussion of discrimination faced by women. We will not here attempt to summarize it except to note that by analyzing all the statistics and examining the role of marriage on wage-earning for both men and women, Sowell presents a much-needed antidote to cliches about women's earnings and professional status.<sup>122</sup>

Mr. Sowell's analysis is so outrageous that Judge Thomas' support for it requires discussion in some detail. In short, at

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<sup>121</sup> Sowell, "The Special Case of Women," Civil Rights: Rhetoric or Reality? 91-108 (1984) (hereafter "Sowell, Civil Rights").

<sup>122</sup> Thomas, "Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," Lincoln Review, vol. 8, no. 2 at 15-16 (Winter 1988) (hereafter "Thomas Sowell and the Heritage of Lincoln").

no point in his chapter devoted to women does Mr. Sowell acknowledge any "discrimination faced by women." Rather, he concludes that inequities in pay and career advancement stem merely from women's own behavior and choices, claiming that women prefer jobs and careers with greater flexibility -- yet lower pay -- to accommodate their roles as wives and mothers.

In attempting to justify the historic pay inequities between men and women, Mr. Sowell goes so far as to claim that:

Women are typically not educated as often in such highly paid fields as mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields such as construction work, lumberjacking, coal-mining, and the like.<sup>123</sup>

Mr. Sowell makes no mention of data that show that a substantial portion of the wage gap between men and women (even after considering factors like experience, education, training, and length of workforce attachment) is attributable to discrimination.<sup>124</sup>

Nor does Mr. Sowell acknowledge the impact of pregnancy discrimination in limiting women's employment opportunities -- even as he gives credence to stereotypes that suggest that working mothers are "not willing to work overtime as often as

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<sup>123</sup> Sowell, Civil Rights at 92. Mr. Sowell is demonstrably wrong. For example, as discussed earlier, thousands of women have entered the "physically taxing and well-paid" field of coal mining, enabled in large part by affirmative action efforts that overcame many of the barriers to women's participation in the industry.

<sup>124</sup> Women, Work and Wages: Equal Pay for Jobs of Equal Value (H. Hartmann & D. Treiman ed. 1981).

some other workers (male or female), or need more time off for personal emergencies" and may thus be "less valuable as an employee or less promotable to jobs with heavier responsibilities."<sup>125</sup> Mr. Sowell instead asserts that "the physical consequences of pregnancy and childbirth alone are enough to limit a woman's economic options,"<sup>126</sup> without recognizing the role that employers play in transforming a woman's pregnancy disability into an excuse for her termination, reassignment, or demotion.

Mr. Sowell even argues that treating women fairly is too costly: employers, he claims, won't hire women who cost them more because of the legal protections against sex discrimination<sup>127</sup> (yet Mr. Sowell refused to recognize this as "discrimination").

And, while Mr. Sowell gives a nod to racial differences between women by recognizing that black women's labor force participation rates were historically higher than white women's, he asserts incorrectly that black women -- who suffer from

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<sup>125</sup> Sowell, Civil Rights at 97-98. Mr. Sowell writes that "[b]ecause of domestic responsibilities and the rearing of children, women also tend to drop out of the labor force completely more often than men do." He suggests that these women "drop out" voluntarily; he makes no mention of the thousands of women who are forced from their jobs for want of supportive and efficient workplace policies and standards, such as job-guaranteed family and medical leave.

<sup>126</sup> Id. at 97.

<sup>127</sup> Id. at 105.

discrimination based on gender and race -- fare better in the labor market than white women.<sup>128</sup>

In short, Thomas Sowell's "much-needed antidote[s] to cliches about women's earnings and professional status," as Judge Thomas puts it, are themselves stereotypical and unsupportable assumptions that perpetuate discrimination in the workplace. Judge Thomas' praise for this analysis -- especially in light of his experience as head of the agency charged with fighting workplace sex discrimination -- is, at the very least, alarming. Certainly it fuels fears that he will not strike down invidious sex-based distinctions as constitutionally impermissible.<sup>129</sup>

Mr. Sowell's analysis leads Judge Thomas to conclude that "[i]n any event, women cannot be understood as though they were a

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<sup>128</sup> M. Power, "Occupational Mobility of Black and White Women Service Workers," (Presented at the Institute for Women's Policy Research Second Annual Women's Policy Conference, June, 1990) (unpublished manuscript); J. Malveaux, "Low Wage Black Women: Occupational Descriptions, Strategies for Change," (unpublished manuscript prepared for NAACP Legal Defense and Education Fund, Inc. 1984) at 8, 12-13.

<sup>129</sup> Judge Thomas expressed support for a similar analysis in another context as well. In an interview published in The Atlantic Monthly, Juan Williams writes of Thomas,

But people who argue that they are victimized in corporate life as part of historical, across-the-board discrimination against a group find little sympathy at [Judge Thomas'] agency. It could be, Thomas says, that blacks and women are generally unprepared to do certain kinds of work by thsir own choice. It could be that blacks choose not to study chemical engineering and that women choose to have babies instead of going to medical school.

Williams, "A Question of Fairness," The Atlantic Monthly, February 1987, at 79.

racial minority group, or any kind of minority at all" (emphasis in original).<sup>130</sup> This statement carries significant implications for any analysis of women's equality under the Equal Protection Clause (which has been interpreted to provide protections against gender-based discrimination that are modelled after those provided against racial discrimination). It suggests that Judge Thomas is less likely to view sex-based distinctions as presumptively discriminatory, as they are treated under equal protection analysis, but rather as the acceptable result of women's choices, behavior, or social roles.

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<sup>130</sup> Thomas Sowell and the Heritage of Lincoln at 16.

## REPRODUCTIVE FREEDOM

A woman's ability to enjoy the full range of personal liberties guaranteed by the Constitution -- her privacy and her equality before the law -- is integrally related to her freedom to control her reproductive life. Judge Thomas, through published writings and one speech, has not only questioned the constitutional basis of the right of privacy articulated in Griswold v. State of Connecticut<sup>131</sup> and Roe v. Wade,<sup>132</sup> but has also expressed approval of the extreme view that the Constitution affirmatively protects a fetus' "right to life."

In particular:

- Judge Thomas offered one of the few specific examples of how he would apply natural law in a speech praising as a "splendid example of applying natural law" an article arguing not only that Roe v. Wade was wrongly decided but that the Constitution affirmatively protects the fetus' "right to life";
- Judge Thomas served on the 1986 White House Working Group on the Family, which authored a report that sharply criticized Roe and other Supreme Court decisions protecting the right of privacy; and
- In other writings, Judge Thomas criticized Roe and even Griswold v. Connecticut, the case protecting as fundamental the right of married couples to use contraceptives.

After a brief introduction summarizing Griswold, Roe, and the right to privacy, each of these concerns will be discussed below.

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<sup>131</sup> 381 U.S. 479 (1965).

<sup>132</sup> 410 U.S. 113 (1973).

Griswold, Roe and the Right to Privacy

The landmark case of Griswold v. State of Connecticut involved a constitutional challenge to a state criminal law banning the use of contraceptives. The lawsuit was brought by a physician and family planning clinic director who were convicted as accessories for providing a married couple with medical information and advice about contraceptives. The Supreme Court struck down the statute as violating the constitutional right of privacy surrounding the marriage relationship.

In Griswold, the Court concluded that a "zone of privacy created by several fundamental constitutional guarantees" rendered the law unconstitutional.<sup>133</sup> In the majority opinion, Justice Douglas cited various provisions of the Bill of Rights: the right of association contained in the First Amendment; the prohibition against housing soldiers in people's homes contained in the Third Amendment; the right to be "secure in their persons, houses, papers, and effects" contained in the Fourth Amendment; the prohibition against self-incrimination contained in the Fifth Amendment; and the Ninth Amendment, which states:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Justice Goldberg, in a separate and famous concurring opinion, wrote "to emphasize the relevance of [the Ninth] Amendment to the Court's holding."<sup>134</sup> Drawing on the

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<sup>133</sup> 381 U.S. at 485.

<sup>134</sup> 381 U.S. at 487.

legislative history and language of the Ninth Amendment, Justice Goldberg stated:

[T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.<sup>135</sup> ...To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.<sup>136</sup>

Justice Goldberg stated that the Ninth Amendment did not constitute an "independent source of rights," but rather reflected "a belief ... that fundamental constitutional rights exist that are not expressly enumerated in the first eight amendments."<sup>137</sup> He further stated that this did not mean that judges should decide cases based on "their personal and private notions":

Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]...as to be ranked as fundamental."<sup>138</sup>

Eight years later, in Roe v. Wade, the Supreme Court concluded that the fundamental right of personal privacy recognized in a long line of cases, including Griswold, included a woman's decision whether or not to terminate a pregnancy.

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<sup>135</sup> 381 U.S. at 488.

<sup>136</sup> 381 U.S. at 491.

<sup>137</sup> 381 U.S. at 492.

<sup>138</sup> 381 U.S. at 493 (citations omitted).

While acknowledging that the district court had rooted this right "in the Ninth Amendment's reservation of rights to the people," the Court concluded that this fundamental right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty."<sup>139</sup> The Court, noting that "prevailing legal abortion practices were far freer" during the 19th century, also rejected unequivocally the argument that a fetus is a "person" within the meaning of the Fourteenth Amendment.<sup>140</sup>

In his writings, Judge Thomas has criticized Roe and even Griswold v. Connecticut, the case protecting as fundamental the right of married couples to use contraceptives.

In two articles published in 1988 and 1989, Judge Thomas criticized Roe v. Wade and the majority and concurring opinions in Griswold.<sup>141</sup> In a footnote in the context of a critique of judicial activism, unenumerated rights and "run-amok judges," Judge Thomas stated:

The current case provoking the most protest from conservatives is Roe v. Wade, 410 U.S. 113 (1973), in which the Supreme Court found a woman's decision to end her pregnancy to be part of her unenumerated right to privacy established in Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold, Justice Douglas found that "[s]pecific

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<sup>139</sup> 410 U.S. at 153.

<sup>140</sup> 410 U.S. at 157-58.

<sup>141</sup> Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63-70 (1989); and Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years 391-402 (D. Boaz, ed. 1988).

guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." Id. at 484 (citation omitted).

I elaborate on my misgivings about activist judicial use of the Ninth Amendment in Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years 398-99 (D. Boaz ed. 1988).<sup>142</sup>

Viewed in context, these remarks clearly criticize the unenumerated right of privacy articulated in Roe and Griswold.

In the article referred to in the above-quoted text, Judge Thomas discusses the Ninth Amendment at some length. He interprets Justice Goldberg's view of the Ninth Amendment as giving the Supreme Court "a blank check" to "strike down legislation."

Unbounded by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. The rhetoric of freedom (license, really) encourages the expansion of bureaucratic government.<sup>143</sup>

Judge Thomas argues that the Ninth Amendment should instead be seen as a reminder that "the Constitution is a document of limited government."<sup>144</sup> What Judge Thomas fails to appreciate is that devaluing constitutional rights of individuals, and the Court's role in protecting them, expands the power of the other

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<sup>142</sup> Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63, n.2 (1989).

<sup>143</sup> Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years 391, 399 (D. Boaz, ed. 1988).

<sup>144</sup> Id. at 398.

branches of government to interfere with those rights. This is hardly consistent with a professed desire for limited government.

Although one could disagree with Justice Goldberg's view of the Ninth Amendment and yet agree with the analysis of the fundamental right of privacy in Roe and in the Griswold majority opinion, Judge Thomas' explicit criticism of the unenumerated right of privacy again shows that he does not support the constitutional analysis in Griswold and Roe.

Judge Thomas served on the 1986 White House Working Group on the Family, which authored a report that sharply criticized Roe and other Supreme Court decisions protecting the right of privacy.

In 1986, Judge Thomas, then chair of the Equal Employment Opportunity Commission, served on the White House Working Group on the Family. The report submitted by that group to President Reagan in December 1986 attributes authorship of the report to "the White House Working Group on the Family," and Judge Thomas is listed as a member of that group.<sup>145</sup>

The Working Group's report includes explicit criticism of a series of Supreme Court decisions affirming the fundamental right to privacy: Roe v. Wade, Eisenstadt v. Baird,<sup>146</sup> and Planned

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<sup>145</sup> A Report to the President from the White House Working Group on the Family, The Family: Preserving America's Future, December 1986 (hereafter "The Family: Preserving America's Future").

<sup>146</sup> 405 U.S. 438, 453 (1972).

Parenthood v. Danforth.<sup>147</sup> In Eisenstadt, the Court invalidated a Massachusetts law that banned distribution of contraceptives to unmarried individuals. The Court's plurality opinion extended the reasoning of Griswold, which was based on a right of marital privacy, and concluded that the right of privacy, to mean anything, must mean the right of the individual, married or unmarried, to be free from unwarranted government intrusion into such personal matters. In Danforth, the Court held unconstitutional a Missouri statute requiring the written consent of a woman's spouse or the written consent of a young woman's parent or guardian before an abortion could be performed; both provisions gave others (a spouse or a parent) absolute veto power over a woman's decision to terminate a pregnancy.

In the context of a discussion of the legal status of the family, the Working Group criticizes Roe, stating that the Court "struck down State attempts to protect the life of children in utero," and Danforth, stating that the Court invalidated state attempts "to protect paternal interest in the life of the child before birth, and to respect parental authority over minor children in abortion decisions."<sup>148</sup> The Working Group's criticism of Eisenstadt appears to be based on its view that the decision denigrates the status of the marital relationship and thus the family.

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<sup>147</sup> 428 U.S. 52 (1976).

<sup>148</sup> The Family: Preserving America's Future at 11.

Rather than giving any consideration to constitutionally-based privacy interests in analyzing Roe, Eisenstadt, and Danforth, the White House Working Group simply describes these cases as decisions made by the Supreme Court "on a philosophical basis which left little room for legal recognition of the family."<sup>149</sup> The Working Group states that these and other decisions from the Court "have crippled the potential of public policy to enforce familial obligations, demand family responsibility, protect family rights, or enhance family identity."<sup>150</sup> Sex education classes and school-based clinics are similarly criticized in the report, described not as providing information about constitutionally protected rights as decided in Griswold and Eisenstadt, but rather as "the abdication of moral authority."<sup>151</sup>

Of particular concern is the Working Group's position that state legislatures and Congress, not the courts, should decide these issues. Such a view of the Supreme Court would eviscerate the Court's historic role in safeguarding constitutional rights. Despite the Working Group's objection to judicial action in this arena, the report lists various options to "correct" such "a fatally flawed line of court decisions," including "the

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<sup>149</sup> Id. at 11.

<sup>150</sup> Id. at 12.

<sup>151</sup> Id. at 27 (citing then Secretary of Education William Bennett).

appointment of new judges and their confirmation by the Senate."<sup>152</sup>

Judge Thomas offered one of the few specific examples of how he would apply natural law in a speech praising as a "splendid example of applying natural law" an article arguing not only that Roe v. Wade was wrongly decided but that the Constitution affirmatively protects the fetus' "right to life."

In 1987 Judge Thomas delivered a speech entitled "Why Black Americans Should Look to Conservative Policiers" at The Heritage Foundation. In this speech, which includes a discussion of the need "to reexamine the natural law," Judge Thomas described an essay as follows:

Heritage Foundation Trustee Lewis Lehrman's recent essay in The American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law.<sup>153</sup>

The Lehrman essay, published in April, 1987, is entitled "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other."<sup>154</sup> In this short, three-page article, Mr. Lehrman discusses:

- 1) "the 'durable' moral issue of our age," which he describes as "the struggle for the inalienable right to life

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<sup>152</sup> Id. at 12.

<sup>153</sup> Address by Clarence Thomas, "Why Blacks Should Look to Conservative Policier," The Heritage Foundation (June 18, 1987) at 9.

<sup>154</sup> Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other," The American Spectator 21-23 (April, 1987).

of the child-in-the-womb -- and thus the right to life of all future generations";

2) "the conjured right to abortion in Roe v. Wade, a spurious right born exclusively of judicial supremacy with not a single trace of lawful authority, implicit or explicit, in the actual text or history of the Constitution itself"; and

3) "the right to life of the child-about-to-be-born -- an inalienable right, the first in the sequence of God-given rights warranted in the Declaration of Independence and also enumerated first among the basic positive rights to life, liberty, and property stipulated in the Fifth and Fourteenth Amendments of the Constitution" (emphasis added).<sup>155</sup>

Mr. Lehrman also refers to the Court's "overreaching" decision in Roe as a "coup" against the Constitution leading to a "holocaust."<sup>156</sup> Through the application of "natural law" theory, Mr. Lehrman concludes that the Constitution affirmatively protects a fetus' "right to life." This view goes far beyond disputing whether there is a constitutional right of privacy and whether such a privacy right encompasses a woman's decision to terminate a pregnancy.

Should the Supreme Court ultimately conclude that the Constitution does not protect privacy or the right to terminate a pregnancy, abortion would not automatically be banned unless the states affirmatively decided to enact restrictive laws. Moreover, Congress and the states, through state constitutions and statutes, could protect the right to choose.

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<sup>155</sup> Id. at 22, 23.

<sup>156</sup> Id. at 23.

But if Mr. Lehrman's extreme view of the Constitution were adopted by the Supreme Court, neither the federal government nor the states could enact laws to protect the right to choose, and state constitutional provisions that protect the right to choose would be voided. To protect a woman's reproductive choices would require a federal constitutional amendment.

In short, Judge Thomas has on several occasions criticized the line of privacy cases beginning with Griswold and ending with Roe v. Wade and its progeny -- cases that protect as fundamental the right of personal privacy in decisions relating to contraception and abortion. Judge Thomas' views go beyond opposition to a constitutional right of privacy to an affirmative belief that the fetus has enforceable legal rights under the Constitution, a view that would lead not merely to the overruling of Griswold and Roe, but also to state control over all aspects of women's reproductive lives.

**CONCLUSION**

In our system of constitutional government, the Supreme Court functions as the last bastion of justice. It is the Court's duty to safeguard individual rights and liberties for all Americans -- especially those who are most vulnerable to invidious discrimination and the deprivation of their rights. In a Court with nine members that has just lost a forceful counterweight to prevailing majority opinion, and in an era of widespread racism and sexism, the stakes in replacing Justice Thurgood Marshall are very high.

Our review of Judge Clarence Thomas' record reveals a complex, extensive pattern of disturbing actions and statements that makes us unwilling to entrust our constitutional future to his care. We fear Judge Thomas approaches the law via a prism clouded by an ideology that misinterprets and ignores legal principles of the greatest importance.

Indeed, this report highlights issues that will have life-shaping impact on millions of Americans, particularly our society's most disadvantaged individuals.

The Thomas record on these issues casts grave doubt upon his commitment to equal employment opportunity that could enable working women and their families to achieve and maintain economic security -- in ways similar, perhaps, to Judge Thomas' own admirable climb out of poverty. His record on constitutional protections against gender discrimination for women -- including women of color who are vulnerable to double discrimination based

on gender and race -- is deeply troubling. And we are extraordinarily concerned by evidence that Judge Thomas will endorse extreme limitations on every woman's most fundamentally important right, the right to make her own reproductive choices.

Our report raises many tough questions that must be answered during the confirmation process. Indeed, considering that this is a lifetime appointment, the Senate is duty-bound to conduct the most thorough interview Judge Thomas has ever faced. The Senators must thoroughly probe, and Judge Thomas must fully address, each disturbing question raised in this report. If Judge Thomas does not affirmatively endorse equal employment opportunity, constitutional protections against gender discrimination, and reproductive freedom and the right to privacy for all American women, the nation cannot afford to place him on the bench of the Supreme Court.

The CHAIRMAN. Before we start the questioning, from this point on, anyone who goes over 5 minutes, I am cutting them off, except if my mother comes to testify.

Senator SIMPSON. Or my mother.

The CHAIRMAN. No, your mother, she wouldn't want you to hear her that long. [Laughter.]

Seriously, please, I say to all witnesses who follow, because if we do not, you are going to be testifying until 11 or 12 o'clock at night. I will be here, but no one else will be. I do not mean my colleagues, I mean no one else out there who you will want to hear will be, I suspect.

Let me get right to it. Ms. Lichtman, you indicated that the Judge is either running away from his record or he did not think it through. How about the possibility he changed his mind?

Ms. LICHTMAN. I will tell you why I have trouble with that as a theory, and it is that he had spoken so often and so completely and so recently into the 1988's and 1989's and 1990 about so many of the issues about which he either refused to respond or tried to distinguish his remarks, and I fear that just really is not believable.

Ms. GREENBERGER. Senator, if I might just jump in, I tried to listen to most of the hearings. I certainly did not hear every single word, but I do not recall his ever saying he changed his mind or that what he had said before was wrong. I think he said he did not mean to imply certain things that seemed very clear from the record, or he said that he had not read what he had signed.

But I do not recall, on these key principles that are of such concern to us, his coming in a straightforward way and saying, yes, I had said the following things about Thomas Sowell, but upon reflection, I have changed my mind about some of his theories, or, yes, I had praised the Lehrman article, but now that I have thought it through, as a judge, I see things differently. That is not what Clarence Thomas presented in the hearings, so far as I know.

The CHAIRMAN. Let me ask you, since you mentioned equal protection—you all did, but I mean you have spoken to it more than anyone else—Judge Thomas seemed to go further than Judge Souter had gone. He said in his testimony that heightened scrutiny should be the standard reply in equal protection cases affecting women. This is where the Court is, but Justice Souter would not acknowledge that standard.

Mr. GREENBERGER. I want to say that I listened very, very carefully and did try to look through the written transcript on this issue, because it is obviously of such central concern, and I think that there is real ambiguity about what Judge Thomas said.

In answer to a number of questions, he prefaced his remarks with "I have no reason to doubt or to question the standard," and that was as formulation that was similar to what Judge Souter used. But he later also said, in answer to a question to Senator DeConcini at the end of the hearings, when Senator DeConcini, in another context, asked him were those qualifying words meant as qualifying words, "I have no reason to believe," but he said yes, he did intend, in fact, to qualify his answer by that kind of preface. I do not know—

The CHAIRMAN. I will dig up the record, I may be mistaken, but my recollection is that he specifically said he accepts the Court's middle-tier scrutiny.

Ms. GREENBERGER. I just want to finish one point, because the gravamen of our objection, even if one assumes he did unequivocally accept it, which I think is ambiguous, is that the basis of his other testimony and his record called into question what he meant when he said he accepted the heightened scrutiny test.

Part of the heightened scrutiny test that he articulated was—

The CHAIRMAN. In other words, it called into question his credibility, whether he was telling you the truth that he accepts it?

Ms. GREENBERGER. Well, I do not know whether I would say his credibility on that particular point, but what his understanding was of the heightened scrutiny test, because an aspect of it is that, when the Government comes forward to try to justify some discrimination that they must show an important governmental interest, but that is not enough. It cannot be an important governmental interest that is based on stereotypes, that is based on fixed notions of what women and men—

The CHAIRMAN. I understand that. So you—

Ms. GREENBERGER [continuing]. And that is part of the heightened scrutiny test.

The CHAIRMAN. Well, it is part of the way this Court without saying they are changing the test, in effect, has changed the result by redefining what constitutes meeting the test.

Ms. GREENBERGER. Precisely, and we saw that—

The CHAIRMAN. I just want to be clear whether my recollection is correct about his accepting, the present test.

Let me yield to my friend from Wyoming.

Senator SIMPSON. Thank you, Mr. Chairman, I appreciate it.

Thank you for your testimony, which I read. I know that is shocking, but I did. I had a little time. We have so many witnesses and there is so much to do, I hope that we can have access to the testimony of the witnesses. I know you are trying very hard to do that, too, but that makes it easier for us to be able to ask questions and do our work, and I appreciate that.

If I might direct these remarks to Ms. Greenberger, because you were speaking of this issue of the intermediate scrutiny test, and you stated in your written testimony that you fear for women's protection and that there are only four members with this heightened awareness or heightened protection, and I think you specifically did say that Chief Justice Rehnquist does not apply that level of scrutiny to gender-based statutes.

But in the questioning by Senator DeConcini, Judge Thomas stated that he supported the intermediate scrutiny test for gender-based statutes. In fact, he said and the record shows that he said, "One could consider and be open to ratcheting up or applying a more exacting standard."

My question is this: Based on his answer there to Senator DeConcini, why do you persist in being critical of Judge Thomas' position on the protection of women under the equal protection clause?

Ms. GREENBERGER. Senator Simpson, I have two basic concerns: One, that this is a statement that is not as clearcut as some of the statements he has made in other areas, certainly, one could consid-

er, and I am very glad that he was open to the possibility, but I think there was some ambiguity about the clarity, but that is only one point.

The second is what his understanding is at the heart of the heightened scrutiny test, assuming that he did embrace it, and the heart of the heightened scrutiny test is the stereotyped notions about what women and men can do cannot serve as a justification for sex discrimination by the Government. And when he has endorsed stereotyped notions again and again, his idea of what that heightened scrutiny test really means is far different than what it has been applied to mean and the way it has been used to strike down discrimination against women in this country, and that really is at the heart of my concern.

Ms. LIGHTMAN. Senator, may I jump in for a second?

Senator SIMPSON. Yes.

Ms. LIGHTMAN. You know, constitutional protections for women against sex discrimination are really rather new. They are some 20 years old. Modern constitutional protections date back only to 1971. And therefore, the protections against providing, for instance, Social Security to Mr. Weisenfeld when his wife died in childbirth for their child, which the Social Security Administration had only provided for moms, but not dads, before the mid-1970s, is something that we, are extraordinarily sensitive.

Those rights are fragile. They are newly won, and they are ones that we can't take risks with. And so when someone says, "I have no quarrel with that," and then later says in response to a later question, late Friday afternoon, to Senator DeConcini, "I think that it's important that when I don't know where I stand on something or I haven't reviewed it in detail that it's best for me to take a step back and say I have no reason to disagree with it, rather than saying I adopt it as mine." And that is what gives rise, it is that kind of statement that gives rise to the uncertainty, the fear of taking a risk.

We can't afford to have unknowns about these important individual rights.

Senator SIMPSON. Well, I understand that, and I happen to—well, I could never address the issue as a woman could, ever. But I do believe that, certainly my position on choice is very clear. I have said that before and I won't get into it. But, because I do deeply believe in it. It is not based on Constitution and stuff like that at all, just real life. That is the only touchstone I put that on.

But he did make—he has made some remarkable responses to questions here about his compassion and his sensitivity, and when you are quoting these things, and we are doing this a lot—we do this here, I do it and the witnesses do it—but Judge Thomas said that discrimination is a cancer on our society, and I am quoting right from, you know, where we were talking about ratcheting up to or applying a more exacting standard.

I would be concerned if we were to see a movement down toward the rational basis test, but I think discrimination and classifications based on race or sex are so damaging to our society and to individuals in particular. And he goes on in that vein to speak of those things, and he has all the while he was here before us.

And I think it was Professor King who was talking about your terrible anguish about the sexual issues, no understanding of the imperative to provide opportunities and choices, and then you make some, I think, hard comments about him with regard to his sister, who sat right here with him all the days of his testimony.

But I think that, you know, the record clearly contradicts that point of yours, if I may respectfully say. He played this key role at the EEOC in convincing the Government to intervene in favor of the plaintiffs in the *Meritor Savings Bank* case. That was ultimately decided that sex harassment on the job was covered by title VII of the Civil Rights Act, and many women in this country have greatly benefited by that decision.

Wouldn't you think that that would show his understanding of the plight of women in general and black women in particular?

Ms. KING. Senator, with due respect for Judge Thomas when he was testifying here, his words were wonderful to a large degree. For me he was testifying. I think his record and what he has done, his conduct, what life represents in actions, not words, suggests to me that he does not in fact understand the plight of women of color in this country.

Let me give you one example. When he was chair of the EEOC, the EEOC did not move to deal with forced sterilization policies in a proper speedy manner, and indeed when they responded they adopted a standard that was most favorable to employers.

Frankly, I am horrified. If there is one thing that means something to black women in America it is to talk about forced sterilization, because women, black women in this country have been forcibly sterilized.

I simply call attention to the fact that his statement about his sister, and you will notice I have the greatest respect for his sister—in fact, I think she demonstrates the capacities, the character of a woman who is deserving, and deserving of more respectful remarks from her brother than she got. I think she showed a great deal of love and compassion to come and support him in this hearing.

Nonetheless, his statements about his sister I think betray a lack of compassion, not only for black women, but for members of his family, and his words during his testimony did nothing to make me feel that he is concerned about anyone other than himself and individuals like him, and lacks understanding about the lives of other black people and what it will take to rise out of the circumstances that he himself found himself in when he was a young man.

Senator SIMPSON. Well, I—you know I think we, Ms. Lichtman, and I am combining you all because time is, obviously, limited to us too, and the chairman is fair about that, but, you know, you have made critical observations about his writings and his works. Have you read all his decisions on the circuit court? Have you read those?

Ms. LICHTMAN. Between the people in my office and myself, I have indeed reviewed many of the kinds of subject areas that his decisions addressed. And, as you probably know, Senator, most of them, if not almost all of them, concern regulatory decisions about the subject of which we have not talked about either in our report or in our comments.

So, to the extent that we reviewed them to see the extent to which he had spoken to any of the things we were concerned about, we did.

Ms. GREENBERGER. You know, Senator Simpson, it is a very good question. And there is a case that is pending now that Justice Thomas heard as a member of the panel that deals with equal protection and sex discrimination of the laws in the context of the FCC, and it tracks the very same kind of issue that was decided by the Supreme Court last term in the *Metro Broadcasting* case, whether or not it is constitutional to make affirmative efforts to ensure that radio stations have a diversity of ownership.

And the Supreme Court upheld the constitutionality of that policy with respect to minorities. The very same issue is pending in the D.C. Circuit now with respect to women-owned radio stations, and the media and press had, in fact, printed some excerpts of the oral argument and some of the questions that Judge Thomas asked.

It was a case that was argued in January 1991, the end of January. Unfortunately, we haven't seen an opinion. It is surprising because I did look and I know that there has been a lot of pride on the D.C. Court of Appeals for the short turnaround time between the time cases are argued and the time they are decided, and for the last 2 years they have been between 1 and 2, at most 3 months is an average time for a decision, and we have been waiting for this case for 8 months.

Justice Thomas asked some very disturbing questions during that oral argument. Perhaps he would have resolved those questions in a way that would allay our fears if that decision had come down. I am sorry in all this 8 months it hasn't come down.

And I might give you some flavor of the kind of question he asked that caused the concern. And very briefly, he wanted to know what are women's issues.

Senator KENNEDY. Can I just say I think the time of the Senator has expired. But I would hope that I would be the next questioner, and you can use the response on my time.

Ms. GREENBERGER. OK. Thank you.

Senator SIMPSON. I thank you, Mr. Chairman.

Senator KENNEDY. Do you want to—I would just at the outset want to join in welcoming this panel to the committee. I think Marcia Greenberger and Judith Lichtman have over a period of years been in the forefront of the fight for equal opportunity and equal rights from the really extremely important and critical time in the decision of the Supreme Court decision, and all of us, I certainly do, take your comments and your testimony very seriously and we thank you for the thoughtfulness—

Ms. GREENBERGER. Thank you.

Ms. LICHTMAN. Thank you, Senator.

Senator KENNEDY [continuing]. With which the presentation has been made.

Ms. King, we are delighted to have you, a distinguished scholar and thoughtful commentator on many of these same areas.

If you would just continue. As I understand, you are now quoting some of the questions raised by Judge Thomas when the circuit court was considering a particular case involving the FCC and the

role of women in terms of the ability to acquire radio stations, I guess.

Ms. GREENBERGER. That is right. Thank you, Senator Kennedy.

And, as I said, we had really hoped that that decision would come down and, in fairness, to see what the ultimate decision was. Right now what we have are the questions that Senator Thomas—that Judge Thomas rather, asked. But they are questions, and he may have just been probing, but they are questions that reflect concern.

He asked what are women's issues? I am at a lost as to what difference there is. He was referring to having women own stations. He said, "But what difference does it make if a woman owns a station, or if women owned all the stations, other than that they own the station? Does it make a difference in programming? Does it make a difference in content of the points of view? Does it make a difference in the editorials?"

Congress had made a judgment that diversity of ownership does make a difference, but he was challenging that directive by Congress to try to encourage diversity of ownership both, obviously, for the public policy of having those business opportunities open, but also for the advantage of hearing different perspectives and hearing points of view.

So, I am sorry an answer had came up in the context of Senator Simpson's question. I wish we would have had that decision as a way of looking at Judge Thomas on the bench. But so far his cases have been primarily in areas that don't deal with the great constitutional questions before us in the Supreme Court.

Senator KENNEDY. Let me ask you, how—I should know. But how is the timing for the release of the decisions decided? Who makes that decision?

Ms. GREENBERGER. Well, I think probably it is up to the panel to decide at what point, and each of the judges has to decide at what point the decisions are ready for release.

The 1990 statistics were—it is about 1.6 months on average between the time of argument and the time a decision comes down. So, unfortunately, this one has been about 8 months so far.

Senator KENNEDY. Let me ask you, are there other—do you consider significant and important issues that are now working their way to the circuit or the Supreme Court that you believe will be extremely important in terms of equal opportunity for women?

Ms. GREENBERGER. Well, there are several key cases that involve certainly constitutional protections under the equal protection clause. This SEC case is a case in point, certainly, at some point I suspect will work its way up to the Supreme Court, and whether women have the same rights of diversity of ownership of the airwaves as minorities do.

There is the *Virginia Military Institute* case, the *VMI* case that has gotten a lot of publicity. It deals with a school that gets large sums of money from the State of Virginia, but allows no women, and the lower court upheld the exclusion of women from the State sponsored school, and the reasoning of the court really demonstrates what I think is at the heart of our concern. It takes stereotype notions of women, it says that this is a rigorous, in fact, a very punishing kind of atmosphere at *VMI*, and the women need more

nurturing, and we have to change the whole kind of educational setting, if we allowed women.

That kind of broad-based stereotyping I do not think would sit well with any on this panel here, and I know that the Justice Department is appealing the case. I am hopeful ultimately it will be overturned. But it is that kind of reasoning that we see with Thomas Sowell, it is that kind of stereotyping that we saw, frankly, with Justice Scalia in the opinion that Judge Thomas so praised and said he hoped would form the majority opinion some day on the Court.

When he dealt with the *Johnson v. Santa Clara County* case and said, well, women basically are not interested in these nontraditional jobs, that is why we do not see them there, that is part of Judge Scalia's opinion that Judge Thomas praised.

We have cases coming up where women have been preempted from juries under different standards than men. The Supreme Court decided last term that is unacceptable on the basis of race, but we have different conflicting lower court decisions, so we know that issue is coming up. Women's basic ability to serve on juries is at stake. So, there are really central issues before the Court.

Senator KENNEDY. Let me ask, Ms. Lichtman, if Judge Thomas' views had been the majority views on the Supreme Court in the last 25 years, how would the society be different with regards to women, based upon his writings, speeches, as well, I suppose, as the extent of his testimony here would shed some light?

Ms. LICHTMAN. Well, I think it is just the fragility of our new-found 20-year-old, if you will, constitutional protections that make us most worried. Marsha Greenberger a minute ago talked about the case of Diane Joyce in *Johnson v. Santa Clara County*, a county that had not ever had women in management positions, 258 jobs. What Ms. Joyce wanted was the opportunity to compete, albeit in a non-traditional job, and what Judge Thomas talked about was Justice Scalia's dissent, I fear, really, that that case could have been decided differently.

His criticism of *Roe v. Wade*, of cases like *Griswold* and *Eisenstatt*, albeit some time before this hearing and not making very clear exactly where he was on those decisions at all at this hearing, I fear, as many of you have raised, for the most fundamental rights of privacy, both marital privacy and privacy for single people.

The rights of working women, the rights of family to social security benefits, I could go on and on. When one endorses stereotypic notions, as he has, in endorsing the works of Sowell and even in offhand remarks as serious as I would suggest to you those offhand remarks in the Lehrman piece, cause women's advocates and advocates for working families and working people a great deal of concern, and I fear that there was nothing that he did in the hearing that allayed that concern.

Senator KENNEDY. Let me ask Ms. King, the Judge talked I think really quite eloquently and movingly, when he described the view outside of his courtroom about the young blacks in buses on their way to the court system, and even mentioned that it is only a small difference between where he sat and he might have sat, in terms of his own life's experience. He also talked about those people who were sort of left out and left behind.

What insight can you provide, based upon your own understanding of his actions, both in government speeches, in terms of the poor, those that are left out and left behind, if his views were to become a majority view on the Supreme Court? Would their interests, based upon his statements and his actions, be advanced or threatened?

Ms. KING. Senator, he has spoken quite eloquently about poor people and about black people. I listened carefully at one point in this hearing, when he was asked about preferences and he was asked about his admission to Yale Law School. And he was asked, I believe by Senator Specter, would he be willing to use that same rationale with respect to a person who had a 10th grade education, and the issue was employment.

I listened very carefully for the Judge's answer, because it had been quite clear about his admission to Yale, and I did not hear the same statement about what the needs of a person with a 10th grade education, the needs of the poor person or minority person who was seeking employment. Employment is critical to many other aspects of life, and I listened carefully and I did not hear an answer, I must say, and that leads me to conclude or fear that, while Judge Thomas is eloquent in talking about poor and minority people, that when it comes to policies that are designed to make it easier for people to have opportunities and to advance, then he would suggest the policies that have been followed with success to date, are the policies that he has difficulty with, affirmative action, class action litigation, so I am at a loss to try to explain the difference between his words and his actions.

Senator KENNEDY. My time is up. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman.

I want to welcome all of you here today. I have appreciated listening to your testimony. Ms. King, the only thing that I saw differently from Judge Thomas was that he just plain rejects the idea of preferences, and there is a legitimate strong argument on his side to do that. In fact, I think the majority of American people would agree with him.

The question is from there, if you do not have preferences, what do you do to right these wrongs, and I think there is a legitimate argument on both sides, a very good argument on both sides as to what you should do.

I happen to come down on the side that nobody should be discriminated against, that literally we ought to right those wrongs in the best way we can, but we should not do so by discriminating against innocent people. But that to me is the only difference. I think he will be, from my experience with Clarence Thomas and watching him on the EEOC, I think he will be very much for women's rights and other rights.

Ms. Greenberger, let me just make one comment. I do not mean to take the full 10 minutes, because I think you folks have had enough questions asked of you. You know, having been before the appellate courts, I would never read into what the Judge is asking to determine in advance what he is thinking, because they ask these puckish questions all the time and sometimes just to see

what your answer is going to be and to see just what—you know, they may be a little fuzzy on it and they may just want to have some better answer than what presently exists in their mind.

That reminds me a little bit of last year with Justice Souter, why, even one of our eminent members of this committee used his briefs against him. You know, when you start using the briefs of an advocate against him when he comes up for a position like Justice Souter came up for, Judge Souter then, you know, that I think is the wrong thing.

Advocates may put forth the best foot that they can for their clients, and they may not please us with some of their advocacy, but nevertheless they do. The same thing, when the judge asks questions, that does not necessarily mean he is going to rule against women or rule against the position that you think is right.

I just point that out, because my whole experience with Judge Thomas has been that he is really a very fair person, who really does want to make the right decisions. Then again, maybe people like Professor Carter, who has just written this recent book on affirmative action, Shelby Steele, who has written a wonderful book that both sides have to admit is an intellectually compelling book. I think Carter's is, as well, a wonderful book.

Certainly, I would not discount Tom Sowell or any number of other less liberal thinkers, less liberal African-American thinkers, if you will, because they are creating a debate that is viable, because they are—like I say, there are arguments on both sides and we are all working on it to see if we can come to good conclusions to resolve them.

You know, I really question, I think it is dubious to think that because a judge asks questions from the bench that look like he is going in one area or going in one direction, that that means he is. I do not necessarily think it is. I think it means—

Ms. GREENBERGER. Senator Hatch, I just want to respond quickly to your two points.

Senator HATCH. Surely.

Ms. GREENBERGER. First, I think there is much more at stake than the differences on preferences, as important as that difference may be.

Senator HATCH. OK.

Ms. GREENBERGER. When Judge Thomas, for example, was at the head of the office for civil rights, he took the position that title IX and other anti-discrimination laws didn't cover employment discrimination. Ultimately, the Supreme Court rejected that position and said employees were protected against discrimination in the statutes. That has nothing to do with preference that would have hurt individual employees who were intentionally discriminated against from getting remedies from the Department of Education and schools.

As another example that we talked about on this panel, Judge Thomas, when he was at the EEOC, took a very restrictive position with respect to employer policies which intentionally and purposefully excluded individual women of child-bearing years from high-paying jobs. That has nothing to do with preferences.

There is a pretty extensive report that we prepared and the Women's Legal Defense Fund prepared of example after example—

and I know time is short—of problems of narrow interpretations with what our laws mean that have nothing to do with preferences, but have to do with defining out of the law purposeful and intentional discrimination, and that is of major concern.

Senator HATCH. I understand, but I remember, you know, these are very intricate difficult questions of law that have been debated pro and con by the very best minds on both sides of the equation, sometimes liberals arguing for what the EEOC did and sometimes arguing on the other side.

I think we brought out yesterday that the Supreme Court basically adopted what he was saying, but it did go a little bit further.

Ms. GREENBERGER. No, it was not basic at all.

Senator HATCH. Well—

Ms. GREENBERGER. Maybe some others want to talk about that, but there was as fundamental and critical difference between—

Senator HATCH. Yes, there was, it went farther than what Judge Thomas—

Ms. GREENBERGER [continuing]. Between what the Supreme Court in nine votes accepted and the position that Judge Thomas advocated when he was at the EEOC. He was rejected by nine Justices in the most critical of issues that have enormous importance for women's employment rights.

Senator HATCH. My point is that does not necessarily make it wrong. He did the best he could. He was not as far as you were or the Court would be, but that does not mean that he is anti-women or anti-anything. My goodness, people differ on these very intricate difficult issues. Now, if he is wrong, I think he would be the first to admit that he was wrong and that the Court overruled him.

On the other hand, I have seen him fight very, very hard to try and enforce the equal employment laws of this country, and he did a job better than anybody I have seen at the EEOC in the whole almost 16 years I have been in the Congress and even before then.

Now, is it perfect, are there not things you can criticize? Of course there are, but, then again, that is true of you, it is true of me, it is true of everybody. Well, I do not want to keep you, but I am just saying that I think it is not as cut and dried or as black and white or as difficult as we tend to make it. There are differences, there are legitimate differences, there are well-reasoned differences, there are honest differences, and sometimes he will be right and you will be wrong, and sometimes you will be right and he will be wrong. I mean that is just the way it is.

Ms. KING. Senator, if I might. I think that one of the major points is that when given an opportunity, Judge Thomas has adopted cramped or pinched views, and let me give you an example.

I was the Deputy Director of the Office of Civil Rights in the Nixon administration, and at that time in which we administered title IX—it was actually passed during that period—and we administered title VI, it was our view that employment was, in fact, covered. This precedes Judge Thomas.

What I think that we have to worry about is does he—and we do worry about it—does he seek opportunities, the way it almost comes down, does he seek opportunities to adopt these very pinched and cramped statutory interpretations? Is he indeed reversing or

going backward, rather than forward, in providing opportunities? And I think that is what we are stressing.

We are not just talking about stereotypes of women, at least I am not. I am also talking about the fact that a good portion of the minority community in this country are women, and we women benefit from, and suffer, because we are both minority and because we are female. So we suffer from the stereotypes, but we also suffer from the fact that we too get caught by the lack of opportunities.

And I think that the point here is that some of us at least feel that he seems to reach for the opportunity to adopt a more pinched version. Now, that is not to say that within the African American community that we cannot have multiple views, multiple strategies, and indeed we shouldn't have a vigorous debate about what some of the remedies should be.

But, as some of the professors pointed out on the panel this morning, Judge Thomas doesn't seem to be in the mainstream, and I think that is worthy of note. I mean, there are some point at which, not by himself, but I certainly wouldn't put him in the center, and I think that that is worthy of note, even though I quite agree with you that there is room on all sides of this debate for different views and different strategies.

I would also point out that we are waiting to get a clearer view of Judge Thomas' strategy because the only thing that we have been able to infer is either that he lacks one or that he wants to cut back on those remedies that have proven effective in the past.

Senator HATCH. Well, I respect all three of you, and you are all three very intelligent lawyers and thinkers, and I have had enough experience to know that I don't want to really get in a tough debate with any of you. You are very, very good.

But let me just say that that has not been my experience with Judge Thomas, and I think Guido Calabresi, the Yale Law School dean, said that he is definitely in the mainstream. You may not agree with him on everything, but he is definitely within the mainstream, and within the legitimate mainstream. And I agree with that.

But there are differences and I am glad that—we will keep working on them and see what we can do to bring people together.

But thank you for being here.

Ms. KING. Thank you.

Senator HATCH. I enjoyed listening to you and appreciate your testimony.

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. Mr. Chairman, I don't believe I have any questions.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I have no questions for this panel.

The CHAIRMAN. Senator Simon.

Senator SIMON. I have no questions. I have read all three statements. They are excellent. I think, Professor King, your statement was more than excellent, it was eloquent, and I thank you.

Ms. KING. Thank you, Senator.

The CHAIRMAN. Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

Ms. Greenberger, you had mentioned earlier in helping us with some background on the Judge that he hadn't read what he had signed, and I was wondering if that was testimony that you had heard or what the source of that was.

Ms. GREENBERGER. Yes. In the White House working group paper on the family, there were a number of very troublesome statements that that report contained, including a challenge to the appropriateness of a Supreme Court decision, the *Moore* case that dealt with the right to privacy, protecting a family, of a grandmother living with her two grandsons who were cousins.

Senator BROWN. I am familiar with that case.

Ms. GREENBERGER. And that that violated the zoning ordinance. And that particular White House report among other things challenged that case as being wrongly decided, and Judge Thomas had been part of the group that signed onto that report.

His response was that he wrote only one section of the report and had never read the rest of the report that had contained a lot of very troublesome and controversial positions.

Senator BROWN. Your view of it is that he signed that report?

Ms. GREENBERGER. Yes.

Senator BROWN. He physically signed the report.

Ms. GREENBERGER. Well, I don't—he was indicated as one of the preparers and supporters of the report, and there was nothing on the basis of that document when we certainly looked at it to give us any indication that when his name was on the report as part of the Working Group there was anything in the report that he disagreed with.

He said in his testimony he didn't read many sections of the report, and only read the one section on low income families that he prepared, and that was how he distinguished what some of the troublesome statements were in the report from what he said his views were.

Senator BROWN. I think it is important to get the facts on the record. First of all, he never signed anything, by your own admission. That report was not signed.

Second—

Ms. GREENBERGER. I think I said signed off on.

Senator BROWN. Perhaps I took the notes incorrectly.

Ms. GREENBERGER. But certainly I think for the public reading it, and I think we did try to be as careful as we could, it was certainly our impression that as part of the Working Group it was a report that he endorsed and supported. There were no dissenting views that he signed off on or indicated.

Senator BROWN. Well, I—on the contrary, the folks who helped put that report together very clearly indicated that he had not authored the section that you found objectionable, that there was no attempt to link him to that section that you found objectionable, that his involvement, indeed, was limited to a working paper that he presented.

I find that concerning. To suggest that you are responsible for something someone else has put together, obviously, does not get us to a good judgment of that candidate.

Ms. GREENBERGER. Senator Brown, I just do want to stop and say, if someone else put a report together and he had no connection to

it, I wouldn't ever suggest that he had a responsibility for it. This was a report that had his name on it, and it was a very natural and honest expectation that since his name was on it it was a report that he supported. It had no—it didn't, there were no dissenting views indicated.

And certainly in the general debate about that report, it was very controversial, there were no public statements he had ever issued after it was released disavowing any of its positions. It was only during the confirmation hearings when the question was raised that he said that there were aspects of the report that he had nothing to do with it in terms of drafting, but also had never read.

And that may have been his method of operation——

Senator BROWN. You know, the drafters—it may not have been that you had a chance to listen to that, but the people that put that report together had indicated that he had not seen that portion of the report that you are concerned about. It had not been circulated to him. That he did not contribute it—to it. And he does not claim it.

Your own report, on page 45, makes I think a very significant charge and, obviously, a very serious one. It says, "In Judge Thomas' view the Court may not rely on the constitutional right to privacy to prevent a legislature from, for example, limiting the number of children a family may have or require, or requiring the sterilization of certain individuals so long as the State could articulate a rational reason for the policy."

Obviously, that is a very extreme view and a great seriousness. May I inquire where that information came from?

Ms. GREENBERGER. When we prepared this report, we took Judge Thomas' written record and statements at face value, and there has been a lot of discussion since that time about the fact that when he came to testify he had said that he didn't mean to imply certain things that many people have said.

Senator BROWN. Well, no. No. My question is where is it you got that from?

Ms. GREENBERGER. Well, then let me go back and be very specific. He did, for example, refer to Griswold and the right to privacy as an invented right. He did have his name on this working group paper which challenged the *Moore* case and challenged the right to privacy.

Senator BROWN. I am sorry. The question that I asked, you have given a description of the Judge's view.

Ms. GREENBERGER. That we took based on what he himself had endorsed, in our view, and which many people assumed he had endorsed and meant. What he has come in and——

Senator BROWN. Well, the fact that he specifically states that he had never seen that——

Ms. GREENBERGER. Well, we, of course, didn't——

Senator BROWN [continuing]. Did not author it.

Ms. GREENBERGER. Right.

Senator BROWN. Does this mean that this portion of your report is no longer valid?

Ms. GREENBERGER. No. I think that part of what our testimony today does is take what we had looked at, at the written record,

and when this report was prepared it was on the basis of his enforcement record, his statement, his writings, and compare those to his testimony and see if some of our concerns that were reflected from his record were allayed by his testimony.

Unfortunately, and I do mean that, rather than our fears being allayed, they were heightened. In the area of privacy, he did say at the hearings that he did agree with the *Moore* case, and what he said at the hearings, as I understand it, was he hadn't read the section of the report that criticized the *Moore* case.

So it was——

Senator BROWN. But specifically here——

Ms. GREENBERGER. It was some moment that he said that he agreed with——

Senator BROWN. Excuse me. I am trying to get the source. I am hoping you can say we got this statement from somewhere. To say that someone would allow forced sterilization is a very serious charge. I would hope you would be willing to share with us where you found that information.

Ms. GREENBERGER. The right to privacy has been used to prohibit the government from forcing individuals to be sterilized. It is the right to privacy as it applies to procreation for married persons and for single people. That the text thereof——

Senator BROWN. Didn't the Judge specifically state——

Senator KENNEDY. Mr. Chairman, can the witness be permitted to answer the question without interruption?

Senator BROWN. Well, I would like to have the witness answer the question.

Senator KENNEDY. Well, maybe they can answer it whatever way that they like.

Senator BROWN. I believe this is my time, Senator.

Senator KENNEDY. Can they answer it the way that they—they are witnesses. We have followed—it has been very orderly. I would like to hear the witness respond to the question.

Senator BROWN. Well, I believe it is my time, Senator.

Senator KENNEDY. But the committee, the Chair is entitled to ensure that the witnesses are going to be treated courteously.

The CHAIRMAN. Gentlemen? You are OK, aren't you?

Ms. GREENBERGER. I would appreciate being able to finish because I think I can respond to your concerns.

Senator BROWN. Sure. I would appreciate it.

Ms. GREENBERGER. Thank you, Senator Kennedy. I am happy to go forward.

The right of privacy is of such enormous concern as it affects procreation. Because of the right to contraception and the right to abortion, but also so that women have a right not to be sterilized and have a right to have children. It is both sides of the equation, as Justice O'Connor herself recognized in questions that she has asked on this issue.

If there is not a strong right to privacy that protects not only married individuals but single people too, we in this country do not have a strong right to protect against sterilization, against being forced not to have children or to have abortions against our will, as well as the right to have them.

When Judge Thomas came, and we know there have been so many questions on his views on the right to privacy, he was questioned again and again about the right to procreation, including sterilization, I would assume implicitly. And what his views were, he said that he thought there was a marital right to privacy.

But when he was questioned, for example, by Senator Biden, does that apply to single people, I think there was a real ambiguity and there was a grave moment where it seemed as if he said yes. But then there was the break, and Judge Thomas came back and started talking about equal protection. That if there was a right for married persons there would be a right for single people on equal protection, not on right to privacy grounds, and that is so central in terms of whether we as individuals have these rights.

And, unfortunately, and I cannot underscore how unfortunate I think it is, I didn't hear what I hoped to hear. That Judge Thomas would allay some of these concerns that apply far more broadly than abortion, even more broadly than contraception, but to the very right to have a child, not to be sterilized, for all Americans in this country.

Senator BROWN. Let me just observe, because the time has run out, the question was what the source of this very serious charge was. The report that makes this very serious charge was written and published before the hearings that have been referred to, not afterwards.

Ms. GREENBERGER. That is right.

Senator BROWN. So it does not appear what was said in the hearings could be the source of—

Ms. GREENBERGER. I was responding, Senator Brown, to your question to me of whether there was something in the hearings that allayed the concerns that were in the report.

Senator BROWN. I guess my question throughout this has been the source of this very serious charge where he said that he would allow sterilization.

Ms. GREENBERGER. The source again—and it is a 75-page report, and there are a lot of footnotes and a lot of references in the report to the written record, but based on that record before the hearings. The sources included that White House Working Group, which he later disavowed in the hearings, the sources included his questioning of *Griswold* and the right to privacy is an invented right. The sources included his footnote questioning of the validity of *Roe v. Wade* from conservatives, of which he included himself as one. The source included some references in political statements and other places he had made with respect to abortion and right to privacy.

So, there are a number of sources that are cited that were the basis of our concerns when the report was written, and, as we discussed, those concerns were only heightened after the testimony.

Senator BROWN. Thank you.

Senator KENNEDY. Mr. Chairman.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. As I understand, Judge Thomas was as part of the working group and the report was a working group report. I think the record speaks for itself.

I have no further questions.

The CHAIRMAN. The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

I would like to welcome the distinguished ladies here testifying. At this time, I have no questions.

The CHAIRMAN. There are a few questions that I may submit in writing. You have answered my questions already.

I am as concerned as you are about issues raised—privacy, the answers on *Eisenstadt* and others. I am not certain that he was as equivocal or supportive as you think he was, but I acknowledge that I had to keep coming back to the issue, because his answers were not always to the point. I am going to have to rely on the record to make that judgment myself, and I have not yet reviewed it at this point. But I do truly appreciate your testimony. It was informative and articulate, as usual.

Professor King, your opening statement was as illuminating as it was moving, and I want to thank you for sharing it with us. Thank you very much.

Ms. KING. Thank you.

The CHAIRMAN. With that, we will thank this panel and move to our last panel for today, but not least important, by any stretch of the imagination.

Our next panel will be Ms. Emily Holifield, a member of the Compton, California Chapter of the NAACP; Ms. Evelyn Bryant, president of the Liberty County, Georgia Chapter of the NAACP; and Ms. Diane Frazier, commissioner, from the Chatham County, GA.

I welcome all three of you. I see a fourth person making his way here and I do not have a name. I did not have Reverend Haygood's name on this list.

Reverend, have you been invited to testify?

Reverend HAYGOOD. I believe so, Senator.

The CHAIRMAN. I am just curious. We are trying to find out who you are, that is all.

Reverend HAYGOOD. Thank you, Senator.

The CHAIRMAN. Thank you very much.

Rev. Lawrence F. Haygood, from Tuskegee, AL. Welcome, Reverend. Please have a seat.

Reverend HAYGOOD. Thank you, Senator.

The CHAIRMAN. Reverend, I was not in any way implying that you should not testify, I would just like to know who is testifying, so I can properly introduce them. Welcome. Did you drive all the way up from Alabama today?

Reverend HAYGOOD. As a matter of fact, I got the train, Senator.

The CHAIRMAN. You got the train, Amtrak. God Bless Amtrak. Were it not for Amtrak, some of us would not be here, myself included. I hope you enjoyed your trip.

Now, I thank you all. This is late in the day, I am delighted to have you all here. I am anxious to hear what you have to say. Has the panel concluded how they would like to start and who should speak first, or should we go in the order that you were called. We will go in the order called.

Ms. Holifield, thank you very much for coming, and please let us hear what you have to say, and please keep it to 5 minutes.

**STATEMENT OF A PANEL CONSISTING OF EMILY HART-HOLIFIELD, COMPTON, CA; EVELYN BRYANT, LIBERTY COUNTY, GA; DEANIE FRAZIER, COMMISSIONER, CHATHAM COUNTY, GA; AND REV. LAWRENCE F. HAYGOOD, TUSKEGEE, AL**

Ms. HOLIFIELD. Senator, just for the record, in order to try to conform with the 5 minutes, I would like to have my whole testimony entered into the record, but I am going to skip through the statement.

The CHAIRMAN. It will be.

Ms. HOLIFIELD. Thank you.

The CHAIRMAN. We appreciate the difficulty in cutting it to 5 minutes. I am not sure it is true, but someone once told me that Thomas Jefferson said, "I would have written you a shorter letter, except I did not have the time," I am paraphrasing it. So, it is hard, and I appreciate that. Thank you for trying.

Ms. HOLIFIELD. Thank you very much.

Honorable Chairman Biden and honorable Senators of this great Senate committee, I am Emily Hart-Holifield, an educator employed by the Compton Unified School District. I am a Compton Community College senior trustee member. Further, I am the person who seconded the famous motion on Saturday, July 20, 1991, at a regular meeting of the Compton Branch of the NAACP, to support Judge Clarence Thomas, President Bush's nominee for appointment to the U.S. Supreme Court.

Mr. Chairman, little did I know that this action taken by the NAACP Compton, CA branch, would echo all around this Nation, waking people up and causing them to really think. I have named this motion, Mr. Chairman, "A candle, a flame for mankind."

Mr. Chairman, I am supporting Judge Clarence Thomas, because I feel that he will make an excellent judge, a judge that will represent all of the people throughout this Nation. Judge Clarence Thomas is qualified, is a role model and has developed a philosophy of self-help and self-reliance, and I do not see anything wrong with that.

Senators at this time, I cannot think of a more timely cycle than now for the self-help and self-reliance program that U.S. Supreme Court Judge Clarence Thomas will be able to implement as soon as you honorable Senators have confirmed him to this appointment.

Honorable Senator Kennedy, whom I have had and still do have a lot of respect for, I would like for these pictures to enter into the record as a beautiful school in Compton, CA, that bears his namesake and carries the legacy for his name and his family name in Compton, CA.

I live about 1½ miles from Robert F. Kennedy Elementary School, in Compton, CA, and I wanted to say for the record, Senator Kennedy—he is not here now, but I want the record to reflect—when I go through this area each morning on my way to work, I am reminded of the respectful work that the Kennedy family carried out during the civil rights movement. I am reminded, Senator, that you gave so much, your precious sacrifices can never be bought, paid for or forgotten.

I am reminded that you and your family are winners, and I am also reminded that when Judge Clarence Thomas is confirmed, he

will also be a winner in the 1990's, and he too will have a legacy, one that he so well deserves.

All of the Senators here today, I would like to say to you, I do not believe that Judge Clarence Thomas could have come from his impoverished background and forget his background now. I do not believe that Judge Clarence Thomas will forget his mother or his sister or any unfortunate group. I do not believe that he will forget the struggles that he has experienced to get him where he is today, soon to be a U.S. Supreme Court Justice, when you confirm him. Senators, I do not believe that Judge Clarence Thomas will forget the trust that each of you put in him.

With these points in mind, I believe that Judge Clarence Thomas will be the judge to help guide us through the U.S. Supreme Court and to the next century and far beyond the year 2000.

Honorable Senators, when I seconded the motion on Saturday, July 20, 1991, to support Judge Clarence Thomas, at the regular Compton, CA Branch NAACP meeting, I never dreamed that this seconded motion would be unanimously supported by all members present, with a 32-to-0 vote. I never dreamed that the echoes that would go around this Nation would be so widespread all over this great Nation. I never dreamed that this action on behalf of Judge Clarence Thomas by the NAACP Compton Branch would cause so many people to reactivate their critical thinking skills.

Honorable Senators, I never dreamed that this little cotton-picker from the plantations of Louisiana would ever be able to present herself on behalf of anyone, and especially in front of the great Members of the U.S. Senate.

Honorable members, I want to thank you for the golden opportunity, for listening to me today, Tuesday, September 17, 1991. Senators, I am proud of each of you, and I am proud of Judge Clarence Thomas, and I am thankful to President George Bush for nominating him.

As I have previously stated, Senators, the NAACP Compton Branch, in July, on July 20, 1991, voted to support Judge Clarence Thomas for appointment to the U.S. Supreme Court, and this action sparked a very positive interest in people thinking all over the Nation, regardless of color, regardless of ethnic background, and even regardless of gender.

There was an article that I wish you to read and to remember, presented by Mrs. Margaret-Bush Wilson. As you note for the record, Senators, Mrs. Margaret-Bush Wilson was the executive director of the NAACP, and she is on record not supporting the present position of the NAACP.

Honorable Senators, you are important and you mean so much to me and the people around these United States. Your votes will be counted for confirming Judge Clarence Thomas' successful appointment to the U.S. Supreme Court, making it possible for him to move with his work on and helping to strengthen affirmative action programs, and thus making it possible for affirmative action programs to work, so everyone in this Nation can prosper. He has stated that affirmative action programs are not working now for everyone, and I certainly agree.

Honorable Senators, I would like to remind you of a brief statement made by Judge Thomas at a National Institute for Employment Equity, on May 26, 1984, where he stated:

I have heard it stated over and over again that we as a Nation have done enough and that the doors of opportunity for women, blacks, Hispanics, and those of other national origin and religion have been opened, that the laws against injustice are on the books, and the people are tired of the plight of the minorities. Well, no one is more tired of the plight than the Nation's minorities. No one is more worn out by the fight to stay decent and respectful, to stand in the midst of the squalor of East Harlem and look out toward the towering spires of power in Manhattan, less than 30 or 40 blocks away, and say there the doors of opportunity are opened to say nothing. The question is how do I get there. Those 40 blocks, those short 40 blocks are, for many, a lifetime.

I want to thank you. If I do have some time, I will come back. Thank you very much, Senator.

[The statement of Ms. Holifield follows.]

Testimony of Emily Hart-Holifield before the Senate Judiciary  
Committee in support of Judge Clarence Thomas to be an Associate  
Justice of the Supreme Court

September 17, 1991

Honorable Chairman Biden, and Honorable Senators of this great  
Senate committee,

I am Emily Hart-Holifield, an educator employed by the  
Compton Unified School District. I am a Compton Community  
College Senior Trustee Member, further, I am the person who  
seconded the Famous Motion on Saturday July 20, 1991 at a regular  
meeting of the Compton Branch of the NAACP to support Judge  
Clarence Thomas, President Bush's nominee for appointment to the  
United States Supreme Court.

Mr. Chairman, little did I know that this action taken by  
the NAACP Compton, California Branch would echo all around this  
nation, waking people up and causing them to really think.

I have named this motion, Mr. Chairman, "A Candle, a Flame  
for Mankind".

Mr. Chairman, I am supporting Judge Clarence Thomas because he will make an excellent United States Supreme Court Justice who will represent all the people of these United States. Judge Clarence Thomas is qualified, is a role model and has developed a philosophy of self help and self reliance.

Senators, at this time, I cannot think of a more timely cycle than now, for the Self Help and Self Reliance Program that United States Supreme Court Judge Clarence Thomas will be able to implement as soon as you, Honorable Senators here confirm him to this appointment.

Honorable Senator Kennedy, I would like to say to you that your namesake has a legacy in Compton. I live about a mile and a half from Robert F. Kennedy Elementary School in Compton, California.

Senator Kennedy, when I go through this area each morning on my way to work, I am reminded, Senator, of the respectable work that your family carried out during the Civil Rights Movement. I am reminded, Senator, that you gave so much and that

your precious sacrifices can never be bought, paid for or forgotten. I am reminded Senator, that you and your family are winners, and I am also reminded that when Judge Clarence Thomas is confirmed, he too will also be a winner in the nineties, and he too, will also have a legacy, one that he so well deserves.

To all Senators here today, I would like to say to you - I do not believe that Judge Clarence Thomas could have come from his impoverished background, and forget his background. I do not believe that Judge Clarence Thomas will forget his Mother or his sister and other unfortunate groups. I do not believe that he will forget the struggles that he has experienced to get him where he is today, soon to be a United States Supreme Court Justice when you confirm him, and Senators, I do not believe that Judge Clarence Thomas will forget the trust that you put in him.

With these points in mind, I believe that Judge Clarence Thomas will be the Judge to help guide us through the United States Supreme Court into the next century and far beyond the year 2000.

Honorable Senators, when I seconded the Motion on Saturday July 20, 1991, to support Judge Clarence Thomas at the regular Compton Branch NAACP meeting, never dreamed that this Seconded Motion would be unanimously supported by all members present with a 32 vote in favor of, and a 0 vote against the motion. I never dreamed that the echoes from this action would be widespread reaching all areas of our great nation. I never dreamed that this action on behalf of Judge Clarence Thomas by the NAACP Compton Branch would cause so many people to re-activate their Critical Thinking Skills.

Honorable Senators, I never dreamed that this little Cotton Picker from the plantations of Louisiana would ever be able to present herself on behalf of anyone, and especially in front of the members of the United States Senate.

Honorable Senators, I want to thank you for the golden opportunity, for listening to me today, Wednesday, September 17, 1991. Senators, I am proud of you, as I am proud of Judge Clarence Thomas, and thankful to President George Bush.

As I have previously stated, Senators, the NAACP Compton Branch in July voted to support Judge Clarence Thomas for appointment to the United States Supreme Court, and this action sparked a very positive interest in people thinking all over the nation, regardless of color, regardless of ethnic background, or even regardless of gender.

I would like to say, Honorable Senators, that I am in the process of writing the transcript for a book, and that because of this issue of Judge Clarence Thomas' appointment to the United States Supreme Court, which is symbolic of "a candle, a flame for mankind" that was sparked out of Compton, California, this book is estimated to sell at least thirty-two million copies based upon the 32 votes counted on July 20, 1991 for Judge Clarence Thomas at our NAACP meeting.

Honorable members of this great Senate, I have read articles and speeches by others and by Judge Clarence Thomas. I am particularly impressed by an article written by Margaret Bush-Wilson, who is an Attorney in St. Louis, who chaired the National

Board of Directors of the National Association for the Advancement of Colored People from 1975 to 1984. This article appeared in the Washington Post news on Tuesday, August 6, 1991.

The article provides the opportunity for persons to know that Mrs. Bush-Wilson is acquainted with Judge Clarence Thomas. She moves forward to tell the warm hearted story of how she first heard of a bright young man from Yale University, who was about 20 years old at the time. She heard of Judge Clarence Thomas from his employer, Senator to-be John Danforth from Missouri who was Attorney General at the time. Mrs. Bush-Wilson stated that Mr. Danforth hired young Clarence Thomas, and asked if she knew of a place that this young man could live for the summer while studying for the Missouri State Bar.

Mrs. Bush-Wilson indicated that her son Robert, was a law student with plans to work that summer in Washington. She invited young Clarence Thomas to stay in her son's empty room. Mrs. Bush-Wilson said that she did not recall seeing another young person as disciplined as Clarence Thomas. First thing everyday, he

would exercise with her son's weights, and then went off to his studies. She said that she asked of him only one thing -- that she prepare his dinner, and that he show up on time. She went on to describe how they would eat together every night, often with one or two friends or relatives and talk about any and all the problems of the world.

Mrs. Bush-Wilson further stated the Judge Clarence Thomas was a conservative even then, but was impressed, Mrs. Bush-Wilson went on to say, with one so young, whose reasoning was so sound. She must also admit, she states, that his arguments, both legal and logical, forced her to rethink some of her own views! She said that Judge Clarence Thomas knew how to listen as well as talk. Even when they disagreed, she said she found him to be a sensitive and compassionate person trying to do what is right, and working to make the world a better place. She went on to say that back then she sensed that he would one day be in a position to have a larger impact, but had no way of knowing that this

determined young man might one day have the chance to tackle some of our country's problems on this nation's highest Court.

Mrs. Bush-Wilson states as a Supreme Court Justice, Clarence Thomas will continue to defend and protect the rights of the needy, that he does not permit anyone to think for him and he is intellectually honest.

Honorable Chairman, the record must reflect that the former NAACP National Board Chair respectfully disagrees with the NAACP's present position.

Honorable Senators, I do not know Judge Clarence Thomas personally, but I feel that I do, based not upon his color, but rather focusing upon his qualifications as a Judge who is uniquely qualified to represent everyone as a United States Supreme Court Judge, a man of quality, who happens to be black and who will represent all people regardless of their ethnic origin.

Honorable Senators, you cannot afford to select a Judge to represent only black citizens in these United States. The United States Supreme Court Judge must represent all the people.

Honorable Senators, I believe, and I feel, that Judge Clarence Thomas should not be prevented from serving his country as a Supreme Court Justice just because he is obviously black, President George Bush's nominee, and is forty three years old.

At a General Meeting of "Women Employed" on March 30, 1983, Judge Clarence Thomas on his stand of Affirmative Action stated "But with the exception of quotas, I support Affirmative Action remedies because the remedies which are truly necessary to make individual rights a meaningful reality are either not yet on the books, or have not been traditionally used."

Judge Clarence Thomas has indicated that Affirmative Action should be revised and his appointment to the United States Supreme Court will give Affirmative Action a plan and a new direction for this nation.

Honorable Senators, you are important, and you mean so much to millions of people across the United States. Your votes will be counted for confirming Judge Clarence Thomas' successful appointment to the United States Supreme Court, making it possible for him to move with his work, help straighten out Affirmative Action, and thus making it possible for Affirmative Action to work in these United States across the board, and in order for everyone to have a chance to prosper.

Honorable Senators, I would like to remind you of a brief few statements made by Judge Thomas at the National Institute for Employment Equity on May 26, 1984, where he stated "I have heard it said over and over again, that we as a nation, have done enough, and that the doors of opportunity for women, blacks, hispanics, and those of other National Origins and religion have been opened. That the laws against injustice are on the books, and the people are tired of the plight of minorities. Well no one is more tired of the plight than the nation's minorities. No one is more worn out by the fight to stay decent and respectful.

To stand in the midst of the squalor of East Harlem and look out toward the towering spires of power in Manhattan, less than thirty, or forty blocks away, and say there the doors of opportunity are opened to say nothing. The question is how do I get there? Those forty blocks, those short forty blocks are for many a life time journey".

Honorable Senators, you have the answer in your hands for Judge Clarence Thomas to become a United States Supreme Court Justice. All the Honorable members of this great Senate have to do is just push him, and Judge Thomas will fall through the door, he is close enough. Yes it would be nice when you hold his hand and walk him through that door, but I beg of you Senators, just push him, he will fall through the door, he is willing to fall inside the door. I personally would like to see him walk through the door with dignity and pride but I will also challenge a push with the same magnitude of pride.

I am further impressed by Tony Brown's Comments July 25, 1991 in the Nationally Syndicated Column by an article titled

"Clarence Thomas Could Save Black Colleges If Blacks Don't Get Him First". In vowing to destroy Judge Clarence Thomas' career and deny a black man a seat on the United States Supreme Court. Somewhere I learned, or read, that the "Congressional Black Caucus" consisting basically of all one party flopped its wings like Eagles, and flew into the shadows of partisan color lines, stood up, and proudly denounced our able Judge Clarence Thomas for appointment to the United States Supreme Court. By the nature of this action, the Black Caucus members are declaring themselves out in space and out of touch with the problems and issues as they relate to Black Americans today. Honorable Senators, twenty six blacks in Congress do not represent 30 million people anymore than 26 whites in Congress who represent 200 million white people, not ignoring every other ethnic group.

During a speech at Compton Community College on February 14, 1986, Judge Thomas stated "Do not become obsessed with all that is wrong with our race. We are not beggars or objects of Charity. Rather, become obsessed with looking for solutions to

our problems." "Be tolerant", Judge Thomas stated, "of all the positive ideas, their numbers is smaller that the countless number of problems to be solved. We need all the hope and help we can get."

Honorable Senators, I wholeheartedly agree with Judge Thomas' statements. Senator, I hope that you will become more tolerant of a man who has been appointed by the United States Senate to serve, and he has on the Equal Employment Opportunity Commission, and also to serve as Jude, United States Court of Appeals for the District of Columbia Circuit Court from 1990 to the present.

Honorable Chairman, Judge Thomas is a role model for our youth, and our country. He will be a good United State Supreme Court Judge, representing everyone throughout these United States on scales of fairness with Justice.

Honorable Senators, I cannot believe that in the wee hours of the night Judge Clarence Thomas will not remember his path from poverty as he climbed the hills from Pinpoint, Georgia. I

cannot believe that Judge Clarence Thomas' successful appointment that you will make happen by your votes for him will become a vote that is outside Americas's future, and outside the trust that you put in him. I cannot believe that Judge Thomas will forget in the quietness of the night, that he was born an Afro-American, a man whose family is black. I do believe that Judge Clarence Thomas will carry the banner in these United Sates, for motivation and inspiration for our youth, the banner of dreams and hard work are realities for youth, and the banner of hope, faith, fairness and justice for all for everyone throughout this nation. He will carry the banner for fairness and justice for one and for all as a Judge of the United States Supreme Court.

Honorable Senators, I see Judge Clarence Thomas holding his position that you will appoint him to as Judge of the United States Supreme Court. Honorable Chairman, we are closer to our Supreme Court Judge now, and I know that his Self Help and Self Reliance philosophy will not serve as a negative that will hinder

his appointment by you for the next Judge of the United States Supreme Court.

Honorable Senators, Judge Thomas has come a long way from back in Georgia. He pulled himself up by his boot straps, and I see nothing wrong with that.

His appointment to the United States Supreme Court represents hope for the majority of Black Americans, he is a role model.

Success, successes, he is a man of quality. Judge Clarence Thomas, Assistant Attorney General in Missouri, 1974-77, Lawyer in Monsanto, Co. 1977-79, Legislative Assistant to Senator John Danforth (R. Mo.) 1979-81, Assistant Secretary of Civil Rights, United States Education Department 1981-82, Chairman, Equal Employment Opportunity Commission 1982-90, Judge Clarence Thomas is not a perfect man, nor do I believe he ever will reach a perfect plateau, but I do believe that he will be fair and will always represent and carry the banner for equal justice for all.

Honorable Chairman and Senators, I want to thank you for  
your time.

The CHAIRMAN. Thank you very much. We are proud of your testimony. I realize that this is an imposing room, and with everyone watching us on television, it is not necessarily an easy thing to pop in and say, by the way, I have got a few words I want to say.

Ms. HOLIFIELD. Yes.

The CHAIRMAN. I appreciate it. You have done it well.

Ms. Bryant, take your time, be at ease, do not worry about it, but when that little red light goes out, the seat will reject you into the sky. [Laughter.]

I am only teasing you, but try to keep it close to 5 minutes.

Ms. BRYANT. I will.

The CHAIRMAN. Thank you.

#### STATEMENT OF EVELYN BRYANT

Ms. BRYANT. Mr. Chairman and members of the committee, my name is Evelyn Bryant, and I would like to thank the committee for this opportunity to speak in support of my friend Judge Clarence Thomas.

I live in Liberty County, GA, and serve as president of the Liberty County NAACP chapter. I appear here today not in my capacity as president of our local chapter, but as a friend of Clarence Thomas. I do believe that my comments reflect the opinion of the vast majority of black Americans, including my friends and my neighbors.

While Judge Thomas grew up in Pin Point, near Savannah, his grandparents owned a farm near Sunbury, in eastern Liberty County. He spent much of his youth on that farm developing the values which have become a hallmark of his life and achievements. I have not had the pleasure of knowing Judge Thomas for a long period of time, but have developed a great respect for him during the short time we have been friends.

It was a proud day for the citizens of southeast Georgia, black and white, when President Bush nominated Judge Thomas to the Supreme Court. This man, a product of the marshlands of the Georgia coast, the son of a section of the country rich in colonial history, at age 43, has accomplished so much.

Clarence Thomas was born into and grew up in a segregated society. His early years were spent in poverty. He lived his early life in an environment that exposed daily to the abuses of social and economic systems based upon the separation of black and white citizens in all aspects of life.

He is a person who has lived the black experience to the ultimate, yet, rather than blaming the system for any stumbling blocks to personal achievement, has, through hard work, discipline, commitment to strong values and his belief in our system of government, risen from his humble beginnings to the nomination by our President to the Nation's highest court. His sense of values were born and nurtured in a strong home and religious environment. Truly, this is an extraordinary man who conquered deprivation, without self-pity or complaint.

Judge Thomas has acknowledged that he has received a helping hand up from time to time in his educational and professional journey. He has graciously acknowledged this help and has expressed

appreciation to those who have befriended him along the way. But isn't it reasonable to believe that the availability and accessibility to those helping hands have been influenced by the character traits demonstrated by Clarence Thomas. If we will only acknowledge it, haven't all of us achieved much in this life, received help and assistance from others? Few of us can truthfully take credit for all success that we may enjoy.

Young black males in our society are increasingly finding themselves unemployed, displaced from a family environment and resorting to drug use and sales for physical and economic gratification. Young people, possibly as never before, need positive role models as beacons for their lifestyle. It seems to me that Clarence Thomas, his life and accomplishment exemplify the role model that we seek for our young people.

Let me submit that, even though during the last three decades vast strides have been made toward reducing discriminatory practices and expanding opportunities for blacks and other minorities, we are not where we need to be in eliminating bigotry as a bar to opportunity in America.

But, as the economic and educational plight of blacks and other minorities improve, have we also not grown in our ability to think, develop ideas, question fast approaches and articulate concerns with the directions we are going in attacking the ills of society?

Who is to tell all blacks that we are not compelled to join in a lock-step mentality toward the best approaches to improve the life of blacks and other minorities? Who is to tell us that we cannot and should not exercise our right to demonstrate an ability for independent thinking as to future avenues which should be taken to maximize the improvement of the quality of life for our people?

Clarence Thomas has demonstrated that he is an independent thinker, maybe too independent for some self-appointed spokesmen against his confirmation. It is for this very independence of intellect that Clarence Thomas has been criticized by certain black leaders and white liberals. While some may disagree with his approach, no person who knows Clarence Thomas, his caring attitude or his willingness to help others, could ever question his motives and his dedication to improving the life of American blacks.

In contrast with the other members of the current Supreme Court, Judge Thomas alone has firsthand knowledge of the plight of minorities in the United States. Isn't it reasonable to expect him to show understanding and compassion toward those who have suffered discrimination?

Judge Thomas' public statements make clear that he is heartily committed to equal justice and equal opportunity. What sets him apart from the self-appointed spokesmen, however, is his conviction that some old methods have not worked to improve the lot of the great mass of minorities. Judge Thomas agrees with the goals, but sometimes disagrees with the methods because of failed results.

If we are to realize our ultimate goal of total equality, it will not be the result of a single voice coming from black America. Judge Thomas himself said that little progress has been made in the field of civil rights until a mentality and willingness was developed to attack the status quo. Maybe the time has come for all of us to take inventory of the success and the failures of past policies and,

at the very least, open a dialog on where we should be going to maximize the opportunities for all Americans.

Mr. Chairman and members of the committee, the confirmation of Judge Thomas will be a testimonial to what America is about. It will send a loud and clear message to our young people that anything is possible in this country for those willing to make the necessary sacrifices and commitments to hard work and discipline.

The life of Judge Thomas is a perfect example of the promise of equality and opportunity in America. Judge Thomas and his rise from humble beginnings fit like a glove the profile of the American dream. I respectfully urge you and your colleagues to confirm his nomination.

Thank you again for this opportunity to share with you my thoughts on my friend Judge Thomas.

The CHAIRMAN. Thank you.

Obviously, I am not a very fierce Chairman. You have gone twice the time, as well.

Please try to surprise me, Ms. Frazier, and get it in in 5 minutes.

#### STATEMENT OF DEANIE FRAZIER

Ms. FRAZIER. I will. My name is Deanie Frazier.

The CHAIRMAN. I am sorry, I said Diane. I am very sorry. For that, you can go 6 minutes, but not 7. [Laughter.]

Ms. FRAZIER. Mr. Chairman and members of the committee, I wish to thank you for the distinct privilege to participate in one of America's finest expressions of democracy.

As the attention of our great country is focused on the possibility of our having the second African-American on the Nation's highest court, the kind Senators of these hearings show that there is an absolute atmosphere of racelessness, which shows how great our country is. To watch hours on end the superior legal minds dealing on an elevated level, which we the common people never think in terms of, is indeed educational.

Senators, as a member of the Chatham County Commissioners, I stand in awe of this august body and humbled, indeed, that you would permit me even to come before you to make a brief statement in behalf of Judge Clarence Thomas' nomination to the U.S. Supreme Court.

Clarence Thomas represents the kind of person that lets the down and out know that they can rise above the basic social, economic, and educational levels to the pinnacle of American life.

Help make these visions manifested. Help lift the curtain that blocks the light of expectation, which many are blinded because of various considerations and situations. Help make a dream real, a contribution possible, a greatness of national pride even greater. Make a decision to help our national image become just a little more representative of what we know the world sees in our efforts. Help now by voting for Judge Thomas to become an Associate Justice of the U.S. Supreme Court.

Mr. Chairman and honorable Senators, it may cause a debate, should the flow of events that brought Judge Thomas to this point be referred to as miraculous. Yet, the debate can be shut off. If we consider the fact that this very nomination is beyond the natural,

our willingness to maintain the desired condition of separation of church and state is firm, but I have a feeling there is a strange activity taking place right here between these hallowed walls, that it may be generally accustomed to experience.

The Central Georgia Conference of the Christian Methodist Episcopal Church, with Rev. Joseph C. Cole, as Bishop, highly recommends Judge Thomas, because the more than 9,000 members feel that justice would be served, should you favorably consider Judge Thomas.

The St. Paul Christian Episcopal Church, the largest black Methodist church in Savannah, with Rev. Dr. Henry R. Delaney, pastor, prayerfully recommends to this committee Judge Clarence Thomas, because there is hope in his nomination, and confirmation will represent to our children and future generations that a poor black man can rise to the highest court in this land.

The historical effectiveness of this confirmation will foster good will between mankind in many ways that we can never fully fathom. Your accountability for making this mammoth contribution will long be remembered as the Senators who were the epitome of those who search for quality beyond pigmentation, beyond former barriers, and reveal that a major change has become a part of democracy's efforts at the declarations now in progress.

The way in which the hearings have been conducted make the whole Nation resound with the melody "America, the Beautiful." The majority of the population, those without private agendas but with a public thirst for fairness and justice are supportive of Judge Thomas, and we respectfully urge your worthy consideration of the nomination.

In closing, I would like to note that the Board of Commissioners of Chatham County, GA, on September 13, 1991, unanimously endorsed Judge Clarence Thomas' nomination. And because time will not permit me to read it, I would like to enter it into the record, sir.

The CHAIRMAN. It will be.

Ms. FRAZIER. Thank you very kindly.

[The resolution follows:]


  
**The County of Chatham**  
**Georgia**  
**Resolution**

IN SUPPORT OF CLARENCE THOMAS

WHEREAS, Clarence Thomas, a native son from Chatham County, has been nominated by President George Bush as a nominee for Justice on the U.S. Supreme Court; and

WHEREAS, Judge Thomas has proved worthy of the nomination with his service as director of the U.S. Equal Employment Opportunity Commission and mostly recently as a Judge on the United States Court of Appeals, the immediate appellate court to the United States Supreme Court; and

WHEREAS, Judge Thomas' confirmation would not only recognize his judicial qualities but also continue the inspiration for Black America that Justice Thurgood Marshall help to establish; and

WHEREAS, while it appears that Judge Thomas must stand a different test--judgment of his beliefs because of his race--his judicial demeanor and integrity remain above reproach.

NOW, THEREFORE, the Board of Commissioners of Chatham County, do hereby resolve its support for Clarence Thomas' nomination to the highest court in the land and request that our U.S. Senators from Georgia, the Honorable Sam Nunn and the Honorable Wyche Fowler, to not only promote his nomination but champion it as well.

ADOPTED THIS 13TH DAY OF SEPTEMBER, 1991.



  
 Robert L. McCorkle, Chairman

ATTEST:

  
 Sybil Tillman, Clerk

The CHAIRMAN. Congratulations. I want to thank you. You are the only one in 27 days that has come in in 5 minutes.

As a county commissioner, you are an elected official, a member of the county commission?

Ms. FRAZIER. Yes, sir.

The CHAIRMAN. That is a job I had before this job. Be careful or you may get sent here. But thank you very—seriously, thank you very much for your testimony.

Reverend Haygood.

Reverend HAYGOOD. Yes.

#### STATEMENT OF REV. LAWRENCE F. HAYGOOD

Reverend HAYGOOD. Mr. Chairman, my Senator from the State of Alabama, Howell Heflin, we wish to thank you for the superbly excellent leadership you are providing to the people of our great State and for what you have done for us through the years.

Senator HEFLIN. I believe you ought to be allowed a little more than 5 minutes. [Laughter.]

The CHAIRMAN. Well, I can tell you when he does I will hand you the gavel.

Reverend HAYGOOD. And so we thank you, and we certainly we are proud of you. And we thank also your very able assistant, Dr. Long. And I would be remiss if I did not say thank you to my southern brother from North Carolina, Senator Thurmond.

Senator THURMOND. South Carolina.

Reverend HAYGOOD. South Carolina, Senator Thurmond, for your excellent performance.

And to the rest of the members of this Committee—

The CHAIRMAN. I must say to you, Reverend Haygood, if you are looking for extra time you better think of something nice to say about the Chairman. [Laughter.]

I mean, you can look down to either end of this table, you go this Republican from South Carolina and say good things about him, talk about him and you don't say anything about me. You have got 3 minutes, Reverend, and make it quick.

Reverend HAYGOOD. And that is exactly what I was getting ready to do, Senator Biden. [Laughter.]

To really commend you for the superbly excellent manner in which you have conducted these hearings. We thank you so much.

The CHAIRMAN. Fine. Now we will start the clock. [Laughter.]

Reverend HAYGOOD. It was Edward R. Murrow who reminded us that no nation has ever achieved greatness without being called to greatness by its leaders.

During the past decade, Judge Clarence Thomas has called America to greatness. Regarded as the rejected stone by the black leadership establishment Judge Clarence Thomas has now become the chief cornerstone of brotherhood, human equality, and individual liberty, in the land of the free and the home of the grave.

Judge Thomas has carved out a pathway for the new black leadership of the future, and he has left it a legacy that is firm, workable, excellent, compassionate, sagacious, and competitive. Judge Clarence Thomas has proven that he possesses those attributes of

judicial prudence, integrity, and ability essential to serve as an Associate Justice of the U.S. Supreme Court.

His character, energy, compassion, and intellect have positively excited the American public, and the public is demanding his expeditious confirmation. Frederick Douglas has reminded us that "Power concedes nothing without a demand. It never has and it never will."

Kind, genteel, and urbane, Judge Thomas has emptied his life into the lives of the oppressed, the downtrodden, the poor, the forgotten, and the less change people of the times. He has been faithful to the Biblical injunction: "Undo the heavy burdens of the poor and let the oppressed go free."

Impartial, honest, and caring, Judge Thomas, during the past 10 years, has implemented action that is affirmative based on self-help, hard work, discipline, empowerment, excellent of performance, individual rights, personal responsibility, and credible enforcement of civil rights in behalf of all Americans.

Judge Thomas believes that the Constitution is colorblind and that it serves as a basis for diligently working toward a colorblind society. The Constitution, he believes, is a safe harbor that protects individual rights, inherent equality, human dignity, and equal opportunity for all.

Judge Thomas has indicated that welfare dependency has served as a narcotic to those who have been enslaved by it. Our task as leaders is to empower those who are dependent upon public assistance to move from a cycle of dependency to a cycle of self-sufficiency. This can best be done, according to the nominee, through education and training. Education and training is the key which unlocks the door to success and achievement.

The poor, themselves, have the responsibility of ushering in a new culture of character and a rebirth of good manners by rejecting crime, drugs, violence, apathy, and illiteracy. The poor must remember the words of Mr. Myers Anderson: "Mr. Can't is dead. I buried him."

Judge Thomas is a firm advocate of preparation. Recalling President Lincoln, he said, "I will prepare myself and when the time comes I will be ready." Judge Thomas prepared himself, the time has come, and he is ready to serve as an Associate Justice of the U.S. Supreme Court.

Judge Thomas cares enough to make a difference and to change the world for many people so that they may enjoy a more refined quality of life and thereby insure that this Nation, under God, shall not perish from the Earth.

Thank you, and we urge your confirmation of Senator and Judge Clarence Thomas.

The CHAIRMAN. Thank you very much, Reverend.

Let me out of respect yield to your senior Senator for questions first.

Senator HEFLIN. I don't believe I have any questions. The only thing is that I see we have a Holifield and a Frazier on the panel. Is there any pugilistic influence in regard to this? You know, we got Evander Holifield from Alabama.

Ms. HOLIFIELD. Yes, Senator. My name is spelled H-o-l-i-f-i-e-l-d, but my husband's father's name is spelled H-o-l-y-f-i-e-l-d. He changed it when he went to California.

Senator HEFLIN. All right. I don't believe I have any questions. The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

I want to welcome all of you here. I was just thinking about the contrast in testimony, three professors testified earlier this afternoon and now hearing your testimony. This panel talks like humanitarians. You sound like you love people. And that you look for the good in people. And I am so glad to have you here.

I am not going to take up a lot of time. I would just ask two questions from all of you. If you will just answer them starting with Ms.—is it Holifield? Then Ms. Bryant. Then Ms. Frazier. And then Reverend Haygood.

Is it your opinion that Judge Thomas is highly qualified and possesses the necessary integrity, professional competence and judicial temperament to be an Associate Justice of the U.S. Supreme Court? If so, answer yes. If not, no.

Ms. HOLIFIELD. Yes, Senator.

Senator HEFLIN. Your answer is yes. And Ms. Bryant?

Ms. BRYANT. Yes, Senator.

Senator HEFLIN. Your answer is yes. Ms. Frazier?

Ms. FRAZIER. I would like the Senator to read one part of the resolution that my fellow Commissioners signed, and I think that would speak for itself, if I may.

Senator HEFLIN. All right. Go ahead.

Ms. FRAZIER. Whereas, Judge Thomas has proved worthy of the nomination with his service as Director of U.S. Equal Employment Opportunity Commission and mostly recently as a judge on the U.S. Court of Appeals, the immediate appellate court to the U.S. Supreme Court, Judge Thomas' confirmation would not only recognize his judicial qualities but also continue the inspiration for black Americans that Justice Thurgood Marshall helped to establish, and whereas it appears that Judge Thomas must stand a different test—judgement of his beliefs because of his race—his judicial demeanor and integrity remain about reproach.

Therefore, the Board of Commissioners of Chatham County to hereby resolve its support for Clarence Thomas.

And that is a diverse board, I would like you to know. We have four Republicans, five Democrats, three females.

Senator THURMOND. Now, what organization is that? Repeat that for the record.

Ms. FRAZIER. That is the Chatham County Board of Commissioners, Savannah, GA.

Senator THURMOND. Is that county?

Ms. FRAZIER. County. That is correct.

Senator THURMOND. County council in Chatham County.

Ms. FRAZIER. That is correct.

Senator THURMOND. And that is composed how many people?

Ms. FRAZIER. Nine.

Senator THURMOND. How many Democrats and how many Republicans?

Ms. FRAZIER. We have five Democrats and four Republicans.

Senator THURMOND. I see.

Ms. FRAZIER. Three females.

Senator THURMOND. And this is action by them?

Ms. FRAZIER. Pardon me?

Senator THURMOND. And this is action that they took?

Ms. FRAZIER. Yes, sir. On last Friday.

Senator THURMOND. So I presume your answer then is yes to the question I propounded.

Ms. FRAZIER. Yes, sir. Unanimous.

Senator THURMOND. Reverend Haygood?

Reverend HAYGOOD. Yes, sir, Senator.

Senator THURMOND. Second question. Do you know of any reason why Clarence Thomas should not be made a member of the Supreme Court?

Ms. HOLIFIELD. The answer is no, Senator.

Senator THURMOND. Ms. Holifield, no. Ms. Bryant?

Ms. BRYANT. No, Senator.

Senator THURMOND. No. Ms. Frazier?

Ms. FRAZIER. No, sir.

Senator THURMOND. Reverend Haygood?

Reverend HAYGOOD. No, sir, Senator.

Senator THURMOND. That is all the questions I have. I want to thank you for coming, participating in this hearing and adding, I think, greatly to the outcome of the hearing. Thank you very much for your presence.

Reverend HAYGOOD. Thank you, sir.

The CHAIRMAN. Thank you, Senator.

The Senator from Wyoming?

Senator SIMPSON. Mr. Chairman, I thank you, and I am very pleased that I was here to hear these remarks from these fine people because you have a way of cutting through the fog that sometimes envelopes us here as we get into very highly technical stuff.

And it is fascinating sometimes. I learn from it too, but I am sure that the American public, and the vast majority of them, don't have the slightest idea what we are talking about. And nor do they care.

They want to know who this man is that is going to sit and judge, and that is what we are going to do with them—he will be appointed to judge—and who is he. And when you find people like you who, who some earlier ones have known him, and as I said before, I have never seen a more extraordinary outpouring of support by people who know him intimately, and then people who do not. And I believe that you, Ms. Holifield, do not—you had never known him before your, personally that is, before your action in California.

Ms. HOLIFIELD. That is correct, Senator.

Senator SIMPSON. And you have praised his philosophy of self-help and self-reliance, and certain witnesses at this hearing and during these proceedings have described Judge Thomas as being "outside the mainstream," which is a sinister, supposed to be a sinister thing, and I haven't found that at all.

Now you are an educator, a college trustee. I served as a trustee of a small college in Wyoming for 8 years, found it absolutely fascinating. I am sure you do too. And an activist.

And so you have—there you are, and all of you are active in your community, and so you have an opportunity to learn what real people are thinking about this nomination process.

Ms. HOLIFIELD. Yes.

Senator SIMPSON. What do they think about Judge Thomas, whether he is in the mainstream or not, and how he feels about the things that are so critical to them, like self-help and coming from nothing and self-reliance and doing the job?

Ms. HOLIFIELD. Senator, all the people that I talk to on an everyday basis, they are very proud of Judge Clarence Thomas and they feel that this philosophy that he has developed on self-help and self-reliance really needs to be implemented. We need to go back to our roots where we came from. Self-help and self-reliance is no new programs for minorities. Somewhere down the line, we got away from it, so we need to back to that.

Senator SIMPSON. You have placed your entire statement in the record, but you did not get to give it all and it is powerful stuff. I loved what you said about those in the Congress who are black who have judged him.

Ms. HOLIFIELD. Yes.

Senator SIMPSON. You left that out and that is a powerful statement, because I know many members of the Black Caucus and I honestly know some of them who are embarrassed, because they came out too fast, too sure, speaking for their people.

Ms. HOLIFIELD. Yes.

Senator SIMPSON. I loved what you said—I will not go into it all, it is right there in the record—

Ms. HOLIFIELD. Senator, I put my whole heart into writing this. I just skip back and forth, trying to give you as much as I could, but it took me about 3 weeks to write that speech.

Senator SIMPSON. Let me tell you, it is one that everyone ought to read, because it is powerful.

I loved your statement, where you said, "Honorable Senators, 26 blacks in Congress do not represent 30 million people, any more than 26 whites in Congress who represent 200 million white people, not ignoring every other ethnic group."

Ms. HOLIFIELD. Yes.

Senator SIMPSON. That is a powerful and realistic statement. There is no monolithic white vote that any white Senator can speak for, but you see there has been one for blacks, and that is falling apart.

Ms. HOLIFIELD. Yes, Senator.

Senator SIMPSON. Is that the way you see it?

Ms. HOLIFIELD. Yes, I do.

Senator SIMPSON. Well, that is sure the way I see it, too, and it is a frightening prospect for people who are not used to that. That is the way countries grow and groups grow.

Apparently, Clarence Thomas came to your college and spoke in 1986.

Ms. HOLIFIELD. Yes, he did.

Senator SIMPSON. And you heard him then?

Ms. HOLIFIELD. Yes.

Senator SIMPSON. And he said, "Do not become obsessed with all that is wrong with our race, we are not beggars or objects of charity, rather, become obsessed with looking for solutions to our problems. Be tolerant," Judge Thomas stated, "of all the positive ideas, their numbers are smaller, that there are countless numbers of problems to be solved and we need all the hope and help we can get."

So, that must have been quite a stirring talk he gave then.

Ms. HOLIFIELD. Yes.

Senator SIMPSON. Well, he is a role model and he proved that in his testimony here. But this entire thing, I do not know how long it took you, but that is really beautifully done, and I appreciated reading it.

Ms. HOLIFIELD. Thank you, Senator.

Senator SIMPSON. I appreciated hearing from another elected official, Deanie Frazier, from the County Commissioners, and you talked about—did you use the phrase "highfalutin legal experts"?

Ms. FRAZIER. That is not quite—

Senator SIMPSON. You did, didn't you? I loved that. It struck a chord in me. [Laughter.]

Testifying about things that ordinary people do not know about nor care about. You not only stayed within the time limits, and the Chairman is very tough on us when we go against, but he was pretty good and he is very fair.

But you have said some important things about the nomination and the process that we use to carry out this process. What we do, we have our very best legal and constitutional scholars and experts and authorities pass on these nominations that we receive. I believe that is important, but as you point out, we hear a lot of highfalutin testimony, much of which is not understood by some of the people who might catch these proceedings on a busy day of doing their work and going to their jobs and raising their babies.

You have testified as to Judge Thomas' character, and some of these experts have said that character is the most important of the qualities we seek in this job.

Some have said today that what Judge Clarence Thomas has said is not believable. I find that quite offensive, frankly. And some have said that words are wonderful, but no action in his whole life is a pattern of action. I think that your comment, Ms. Holifield, that some of those folks should reactivate their creative thinking skills—you used capital letters on each one of those words, and I love it.

Ms. HOLIFIELD. Yes, because that is important.

Senator SIMPSON. Yes, it is.

Obviously, you find that one who is obviously pleased with what you are saying, but, more importantly than that, I would ask Evelyn Bryant, yours was as very moving statement and you mentioned his accomplishments.

Some have suggested, including those in leadership positions in the black community here in Washington principally, that "Clarence Thomas has forgotten his roots"—that is a phrase now in quotation marks—"forgotten his roots, forgotten how he got to where he is today." How would you respond to those charges?

**Ms. BRYANT.** Well, I do not know where they got the idea from. If you recall in my statement, his relatives, a lot of his relatives still live in Eastern Liberty County, and one person in particular, his first cousin, Mr. Fuller, who is 91 years old, he is in constant contact with Clarence.

In fact, he came up with us on the bus last month when we came here. He is 91 years old and he is in close contact and he loves Clarence to the point where he took a 10-hour bus trip just to support him. So, if there is that type of family closeness with a 91-year-old to come this far just to support a first cousin, who calls him on a weekly or every 2 week basis, that is not forgetting your roots, because he is 91 and he is not forgotten. They are very close.

**Senator SIMPSON.** Reverend Haygood, finally, what would it mean to people in your congregation and your church—how many are in your congregation?

**Reverend HAYGOOD.** We simply have about 300 right now.

**Senator SIMPSON.** What would it mean to them to have a role model like Clarence Thomas on the U.S. Supreme Court?

**Reverend HAYGOOD.** It would really make the difference. Just before I came here, I shared it with one of the young people in our group, and he said that "Clarence Thomas is a person that I trust, he's someone I can look up to, for me he is a role model."

I think in terms of today's communities, particularly in the black community, where there is crime, where drugs are moving on a daily basis, where there is violence, we need role models who have achieved, who can reach back from whence they have come and lift up those who are farthest down. Indeed, the real purpose of leadership is to lift up persons who are farthest down.

The whole debate between Booker T. Washington and W.B. DuBois was a debate concerning methodology. The goal essentially was the same, but they adhered to the philosophy that we must lift up persons who are farthest down, because as we lift up persons who are farthest down, everybody above them will be lifted up, as well.

**Senator SIMPSON.** Well, I thank you.

**Mr. Chairman,** if I may enter into the record just as brief portion of the results of a poll recently released just yesterday by ABC News—I am not much on polling, but I think it surely shows that these groups within the beltway, the views of the special interest groups who oppose this nomination are met nowhere out in the United States, in any part of the United States, in any region of the United States, and so there is going to be a great retooling going on within those groups, as I see it, within these next months.

I ask unanimous consent that be included in the record, and I thank you very much for the stirring testimony.

**The CHAIRMAN.** Without objection.

[The information referred to follows:]

## ABC NEWS POLL: THOMAS, ISRAEL AND THE PRESIDENT

FOR RELEASE AFTER 6:30 P.M. MONDAY SEPT. 16

**BUSH BACKED ON THOMAS & ISRAEL  
BUT FAULTED ON DOMESTIC AGENDA**

Most Americans support George Bush on Clarence Thomas' nomination and the issue of loan guarantees for Israel. But a large majority faults the president for a lack of attention to domestic issues, an ABC News poll has found.

On Thomas, 61 percent approve of the Supreme Court nominee's testimony before the Senate Judiciary Committee, including his refusal to take a position on abortion. Sixty-three percent favor Thomas' confirmation as a Supreme Court justice.

On Israel, respondents overwhelmingly supported Bush's call for a delay in Congress' consideration of loan guarantees for Israel. A majority was inclined to oppose the guarantees, probably reflecting a general antipathy toward foreign aid.

But while the public supports Bush on Thomas and Israel, a sizable majority faults him for a lack of attention to domestic issues: Sixty-six percent said he spends too much time on foreign affairs and not enough time on domestic problems.

The charge that Bush lacks a domestic agenda is the main criticism of the president that resonates with the public as the 1992 election year approaches. Concern about his overall domestic performance was even higher than criticism specifically of his handling of the economy (53 percent disapproved).

A strong majority, 73 percent, continued to approve of Bush's handling of foreign affairs. His overall job approval rating is 69 percent, down from his postwar peak of 90 percent six months ago but still high, particularly in troubled economic times.

**ON THE THOMAS NOMINATION** - The poll reached these findings on Thomas:

- Opposition to Thomas, from such groups as the NAACP, the National Organization for Women and the AFL-CIO, has had little impact on the public. Overall, 59 percent approve of his nomination, including 58 percent of blacks and 58 percent of women. Those numbers are basically unchanged from an ABC poll in late July.

- While the NAACP has charged that Thomas is out of touch with issues of importance to blacks, 61 percent of all respondents - and 55 percent of black respondents - said he does understand the concerns of most black Americans. However, 41 percent of blacks said he does not understand most blacks' concerns. The survey included an oversample of 319 black respondents.

- Support for Thomas' confirmation similarly crossed demographic lines. Among all respondents, 63 percent said he should be confirmed. Among blacks, 61 percent favored his confirmation; among women, an identical 61 percent favored it. Even among Democrats a majority, 54 percent, supported confirmation.
- Sixty percent of respondents supported Roe v. Wade, the 1973 Supreme Court decision legalizing abortion. But an overwhelming 85 percent said Thomas' position on abortion should not be the deciding factor in his nomination. And 61 percent said he was right not to discuss his views on abortion at last week's Senate hearings.
- Most Americans have paid little attention to the Thomas hearings: Only 43 percent followed them "very" or "somewhat" closely, while 57 percent followed them "not too closely" or "not closely at all." Overall, 61 percent approved of Thomas' performance as a witness; among those who watched closely, even more approved - 76 percent.
- Thirty-one percent said the Supreme Court tends to be too conservative, nearly twice the number who called it too liberal - and a plurality. 41 percent, said Thomas would make the court more conservative. Six in 10 called it appropriate for the Senate to consider his political views as well as his judicial qualifications.
- The one negative for Thomas is a 14-point increase in the number of Americans who think Bush could have found a more qualified candidate - from 23 percent in early July to 37 percent now. But 45 percent still say Thomas was among the best candidates available. Eighteen percent remain unsure.

**ON ISRAEL** - Despite current tensions between the United States and Israel, most Americans (68 percent) favor maintaining current ties between the two nations rather than weakening or strengthening them. Most (59 percent) also support the current level of U.S. economic and military aid to Israel.

Bush's call for delays in Congress' consideration of loan guarantees for Israel won the approval of 86 percent of respondents. A majority, 58 percent, said Israel should not be given the loan guarantees, but this is an unfamiliar issue on which opinions may be lightly held. The finding may reflect general public opposition to foreign aid, particularly during economic difficulties at home, rather than any specific opposition to aid to Israel.

Indeed a majority of respondents, 57 percent, said their sympathies are more with Israel than with the Arab nations in the Middle East conflict; just 20 percent said their sympathies are more with the Arab nations. And the number of Americans who think Israel has too much influence with the U.S. government remains a minority, 37 percent.

**BUSH & POLITICS** - While Bush's vulnerability on his domestic performance has a partisan tinge, the concerns do cross party lines. Even a slim majority of Republicans (51 percent) say he spends too much time on foreign problems and not enough time on domestic problems; so do 68 percent of independents and 77 percent of Democrats.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

I want to thank you all for most of you coming so far and probably under difficult circumstances to come and testify in support of Clarence Thomas. I appreciate very much your testimony. I almost felt, when Reverend Haygood got done, we ought to call for a vote. [Laughter.]

Also, I want to tell Ms. Frazier, I am not one of those "highfalutin legal types" that you are talking about, because I am not a lawyer, so I hope you will feel some affinity toward at least one member of the committee.

I want to ask in a serious vein, I think maybe just a little bit different approach some of my colleagues have taken, but it is to get people like you, who I would like to think are the ordinary American people who look at things differently than are looked at here inside the beltway, the people who are my constituents back home, do you have any question about Clarence Thomas' commitment to civil rights and equal opportunity and all of the concepts that civil rights and equal opportunity mean in 1991?

Ms. HOLIFIELD. Yes, I do, Senator. As far as civil rights in 1991, I think we are going to have to stop focusing on progress that we have made—continue to focus on it, but stop looking back and let's move on with our people, teaching them about economic empowerment.

We have been able to move from the back of the bus to the front of the bus, but there is no use of us keep using that for an excuse. We have to move on with the work ethics for our people, teach them about economics, teach them about arriving early in the morning and going out to a job. If they do not want a job, creating a job. This is the work of the 1990's for us, as far as civil rights is concerned.

Senator GRASSLEY. I do not disagree with anything you have said. I think, though, that my question was not clear. It is just whether or not you have any question, if Clarence Thomas is on the Supreme Court, that he will adequately look out for civil rights and equal opportunity and protect the constitutional rights in that area?

Ms. HOLIFIELD. I do. I do believe that he will.

Senator GRASSLEY. OK. Ms. Bryant?

Ms. BRYANT. I believe he will.

Senator GRASSLEY. Ms. Frazier?

Ms. FRAZIER. I believe, from past history, those people who we thought are not supportive of us as a race, I think history will show that those persons made some of the best decisions that affected our lives.

Senator GRASSLEY. Reverend Haygood?

Reverend HAYGOOD. I have no reservations.

Senator GRASSLEY. OK. If Clarence Thomas is unquestionably committed to civil rights, and he has made that statement—and you have said you believe that he is sincere in that and will follow that out—why do you think that your national leadership opposes his nomination? By your national leadership, I suppose I speak mostly to you, Ms. Holifield, because of your association with the local chapter there, but also for Ms. Bryant, as well, as a spokes-

person, primarily you two on that point. The other two can answer, if they want to.

Ms. HOLIFIELD. Well, as of July 30, the national took its stand and the Compton chapter was already on record supporting Judge Clarence Thomas on July 20, so that cannot be taken away from us. But I think the national based their point not to support him based upon some Washington bureau report that was put out, and I have not read it.

Ms. BRYANT. I think that perhaps they could possibly be out of touch with the mainstream of minorities.

Senator GRASSLEY. Do you have anything you want to add, Ms. Frazier or Reverend Haygood, in response to my question of why you think that the national leadership in the civil rights movement opposes his nomination?

Ms. FRAZIER. That question is too formal. First of all, I do not believe that the leadership, as you call it, I think maybe those who are called leadership have a different view, but I think that it is a mixture of things and I think that we see it thrust so often, individuals who probably speak out, and you term those as leaders, and I do not think that is always the case and I think it kind of gets sidetracked. I think our focus, as Ms. Holifield said, our focus should be put more on economics.

Senator GRASSLEY. Well, you are suggesting that maybe the spokesmen in Washington, DC, for civil rights are not necessarily the real leadership of the organizations, but from our standpoint here, those are the people who come and represent the organizations and testify at hearings, not only on nominations, but at lots of different hearings. You know, they are the people that have the high focus in Washington, DC.

I am not finding fault with your—

Ms. FRAZIER. Senator, I am not trying to challenge you, but I think that sometimes, me being an elected official myself, I think sometimes we put buffers between us and people. I think if you would go, just as Joe Blow, I think if you would go to those people, I think that you would get a pretty different prospect of that and I think those people who come, come because you expect them to come.

Senator GRASSLEY. OK.

Ms. FRAZIER. But I think people, the J.Q. Public, the middle class, I do not think it is the down and out people. I think anybody who works for it, be it blue collar, if they are contributing to the tax base of this country, are important, and I think we see more of us reaching out to those people, and I think you would get a different view of what the mainstream minority community is all about.

Senator GRASSLEY. I think you give a very legitimate answer and I do not find fault with it.

Reverend Haygood.

Reverend HAYGOOD. Yes, Senator, I believe that the dichotomy that exists between the traditional black leadership and Judge Clarence Thomas is that, during the last 10 years, Judge Thomas has been within the mainstream of America. He has worked within the system of this country. He has worked with blacks and he has worked with whites and he has worked with Hispanics.

As you know, it was the tradition of black leadership establishment that did not return the telephone calls of Judge Thomas. Judge Thomas went out to them to get their assistance, but we are told that they did not even respect him enough to return a telephone call.

You remember when they had the Fairmont Conference in California. Judge Thomas came back, and the Washington Post noted him as having the thinking that was slightly right of center, and that is when he was appointed to the Reagan administration.

The whole United States of America has seen this difference during this hearing, is that here is one black leader who seriously accomplished what he set out to accomplish. The gentleman from Fairmont said we are excited, because we are going to be a part of changing the world. Senators, that is what Clarence Thomas has done during the last 10 years in America. He has changed the world. He has changed a world so that we can see the majority of the people in this country adhere to his philosophy.

Not only that, but we have seen that the Berlin Wall has been knocked down, we see the torch of freedom being carried to the Soviet Union and to Poland and the Baltic States. Here for the first time in the United States, freedom that we have so dearly articulated and that we find expressed in the Declaration of Independence, flourishing at home and around the world.

Judge Thomas has had a leadership in that. So, I say that when the leadership of the left decides to come and sit down at the table and engage in authentic debate that he has asked for, then there will be some union, there will be some togetherness, and perhaps in our diversity we shall indeed find our strength.

We may differ. The important thing is that our differences do not continue to divide us, that somehow we can sit around a common table, and they can disagree with one another, without saying that he is liberal or he is conservative or he is moderate. But we are Americans. We are neither black or white, brown nor yellow, but we are all Americans and we hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.

Senator GRASSLEY. I have one question that will require a no or a yes. I know my time is up. I did have a lot of other questions, but I think through the course of our discussion here you have covered most of the other ones.

But a very specific question to Ms. Holifield and to Ms. Bryant: Did the national leadership of the NAACP ask your chapters not to support Clarence Thomas, or, in your case, where you announced before they did, did they ask you to reverse your decision?

Ms. HOLIFIELD. In my case, Senator, on July 20, the Compton NAACP Chapter voted to support Judge Clarence Thomas unanimously, and I wanted to say to you that there are far more Democrats than there are Republicans in the chapter. As a matter of fact, I think there are about two or three Republicans in the whole chapter.

On July 30 or 31, the national came down with its decision, and the way they came down on our chapter is they said to retract, resign or we are going to take your charter. There was a reporter

from California, the Wave Newspaper, I understand, called them and said did you know that your Compton Chapter had went on record supporting Judge Clarence Thomas. Little did we know when we voted to support Judge Clarence Thomas even how to get the message to him to let him know that we were supporting him and what we could do to help him. This is what we were trying to wiggle on.

Finally, the news broke and the news spread from State to State, and they said, OK, we are going to give you until high noon, August 10, a Friday, to retract, resign or we will take your charter. Of course, coming up to high noon, we were really talking to the reporters. We had forgotten about high noon, and the national called us and said we will not take your charter, you will not have to resign, you may keep your charter, but come on and let us compromise.

So, we did compromise, and the compromise was that the chapter would not support Judge Clarence Thomas as a chapter, but as individuals we were free to do what we wanted to, which is contradictory. We are on record supporting Judge Clarence Thomas as of July 20. They could not take that away from us.

Senator GRASSLEY. Ms. Bryant?

Ms. BRYANT. Well, my chapter was quite different. They told us that we could support the Judge individually, but not as a chapter, and that is what we have done.

Senator GRASSLEY. Do they have that authority to take your charter away from you?

Ms. BRYANT. Yes, but according to the national constitutional by-laws, the charter can be revoked.

Senator GRASSLEY. Well, you probably ought to get that changed so they cannot do that.

I am done, Mr. Chairman.

The CHAIRMAN. Make sure he pays, like the rest of us, his dues. I pay mine, \$100. Get his dues, and then he can vote, tell him. [Laughter.]

Senator Hatch can something, if he takes the chair, because I am catching the 6 o'clock train.

Senator HATCH. I just want to welcome them for being here.

The CHAIRMAN. I am sorry, I thought you already asked questions.

Senator HATCH. I want to welcome you and thank you for your testimony. We have appreciated it very much and we compliment you for it. I want the Chairman to make his AMTRAK train.

The CHAIRMAN. I yield to my friend from South Carolina.

Senator THURMOND. Mr. Chairman, I ask unanimous consent that a letter to Hon. Hank Brown, U.S. Senate, Committee on the Judiciary, from Gary L. Bauer, president, Family Research Council, be placed in the record.

The CHAIRMAN. Without objection.

[The letter referred to follows:]



September 4, 1991

The Honorable Hank Brown  
U.S. Senate Committee on the Judiciary  
U.S. Senate  
Washington, D.C. 20510

Dear Senator Brown:

As the former Undersecretary of Education, I would like to respond to the Washington Post's report regarding Judge Clarence Thomas' involvement with the White House Working Group on the Family. I chaired the group and was tasked by President Reagan to write a report on the state of the American family.

In order to accomplish the project, a group of Reagan appointees representing various government agencies was enlisted to offer advice, material and direction. The group in no way represented a monolithic consensus of opinion, but in reality, was composed of ~~x~~ individuals with diverse ideas, views and goals. Among those was Clarence Thomas who at the time was the Chairman of the Equal Employment Opportunity Commission.

Judge Thomas provided advice and insight on the issue of Black self-help. Meetings occurred after hours at the Department of Education with discussions centering only around the topics assigned to the participants present. In fact, due to the diversity of its membership, individuals disagreed with various aspects of the report.

To my best recollection, Judge Thomas was not consulted about the sections regarding abortion or the Roe v. Wade decision, nor were they relevant to the sections of the report for which he was responsible.

It is my belief that the Washington Post article was in error. Judge Thomas's role with the Working Group was exemplary, offering advice and perspective on the issues for which he is known.

Thank you for your concern and I trust that this issue can be laid to rest.

Sincerely,

*Gary L. Bauer*

Gary L. Bauer

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The CHAIRMAN. As of sundown, Yom Kippur begins, and out of respect for all of the members of the staff and others on the committee who are Jewish, I want to make sure we stop.

Having said that, let me say to you that this is the people's room. This is not our room, but it is only loaned to us. You should not feel awed any more than we do. It is your room. You have come to it, and you have spoken with eloquence and with your heart. We appreciate your time and your effort. We respect what you have had to say.

We thank you very much, and we are now recessed until 9 o'clock on Thursday morning.

[Whereupon, at 5:49 p.m., the committee recessed, to reconvene on Thursday, September 19, 1991, at 9 a.m.]



# NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, SEPTEMBER 19, 1991

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:03 a.m., in room 325, Senate caucus room, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Kennedy, Metzenbaum, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

## OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. Good morning, everyone. The hearing will come to order.

Let me say at the outset we have a very ambitious schedule today. We have a total of 44 witnesses today that we want to hear from and we will hear from; 23 are opposed to Judge Thomas and 21 are supporting him. There will be a total of 12 panels of witnesses today.

Today we start off with what I consider to be one of the most distinguished panels to speak before this committee or, quite frankly, any committee. The array of talent on this panel is enviable.

Let me begin by introducing the panel, and I am told they will speak not in the order of introduction but in reverse order.

Let me begin by introducing the Hon. Madeleine Kunin, former Governor of the State of Vermont and currently a Distinguished visitor for public policy at the Bunting Institute at Radcliffe College. She is also president of the Institute for Sustainable Communities at the Vermont Law School.

Is it the University of Vermont Law School, Governor?

Ms. KUNIN. It is separate.

The CHAIRMAN. It is separate from, just as it is in Delaware, the Delaware Law School.

And Ms. Kate Michelman, executive director of the National Abortion Rights Action League and probably the most outspoken and most articulate spokesperson for that position in the country.

And Ms. Faye Wattleton who is president of Planned Parenthood Federation of American and, again, probably the best known leader that organization has had and extremely available, I note, over the

years to not only this committee but to major news and talk shows in America making the position of Planned Parenthood known.

And Ms. Sarah Weddington, an attorney in private practice in Austin, TX, who has done a number of very significant things, but one of the things that maybe is most poignant for the purposes of this hearing is that she was the attorney in *Roe v. Wade*.

With that, let me begin with you, Ms. Weddington. I am told the panel would like to move that way. Then we are going to move across, and we will go to Ms. Michelman, Ms. Wattleton, and the Governor will conclude.

Welcome, again, and please, if you can help us, try to keep your comments to 5 minutes. There will be questions. You will have more than 5 minutes to speak, I assure you. Any longer statement that you may have, we will at your request be delighted and anxious to put it in the record for the record.

Good morning, welcome, and the floor is yours.

**STATEMENTS OF A PANEL CONSISTING OF SARAH WEDDINGTON, ATTORNEY, AUSTIN, TX; KATE MICHELMAN, EXECUTIVE DIRECTOR, NATIONAL ABORTION RIGHTS ACTION LEAGUE; FAYE WATTLETON, PRESIDENT, PLANNED PARENTHOOD FEDERATION OF AMERICA; AND MADELEINE MAY KUNIN, FORMER GOVERNOR, STATE OF VERMONT, AND DISTINGUISHED VISITOR FOR PUBLIC POLICY, BUNTING INSTITUTE, RADCLIFFE COLLEGE, CAMBRIDGE, MA, AND PRESIDENT, INSTITUTE FOR SUSTAINABLE COMMUNITIES, VERMONT LAW SCHOOL, SOUTH ROYALTON, VT**

Ms. WEDDINGTON. Thank you. Mr. Chairman, Senator Thurmond, I want to express appreciation for the opportunity to be part of this distinguished panel and to contribute, even if only for a few minutes, to the importance of this deliberation. My name is Sarah Weddington. I am the attorney who litigated and won *Roe v. Wade*.

In 1969, abortion was illegal in my home State of Texas and, in fact, outlawed except to save the life of the woman. However, women did find a way to get abortions—those with money who flew to California and New York, those without resources who often went to Mexico, where it was illegal, or back alleys. And the result was women who died or were seriously injured. It is not a day I ever want to go back to.

A group of women then were trying to provide information about the safest places to go and were afraid they would be prosecuted as accomplices to the crime of abortion. They asked me to look it up. I was the only woman lawyer they knew, and they needed someone who would do it for free. And so I ended up being the person whose research led to *Roe v. Wade*.

It will soon now be 20 years since that decision, and yet I am fearful for its health and well-being because I believe, if the Senate confirms Judge Thomas, that he will vote to overturn *Roe v. Wade* and that laws as extreme as those in Texas will once again be enforced in this land.

I have tried to watch these hearings very carefully. They have been frustrating, not very enlightening, and I tried to find a way to express my frustration. In the attorney general's office in Texas,

there are posters in our child support and paternity section whose caption is, "Would you be more careful if it was you that got pregnant?" The headlines in the Austin paper said Judge Thomas had a sense of humor, and so I thought he would not mind if I altered the poster a little bit to ask if he wouldn't have been more careful about what he has been saying if he were the one who could have gotten pregnant.

Saying things like, "Oh, I just wrote that about Lehrman's article, it was a throw-away line"; or "I have never really thought about this issue. I have never discussed it with anyone although I was in law school when *Roe v. Wade* was decided"; "I really don't have an opinion"—you see, I find that very hard to believe, and I think you should, too.

In fact, his record provides clear indication of the opposite. I think, for example, that when he talked about Lehrman's article, the "right to life" of the fetus as a "splendid example of applying natural law," and other things that the article said that were so extreme that it would require abortion to be outlawed in every State, we have to take that seriously.

I think if he had said something like that about a Supreme Court opinion, *Plessy v. Ferguson*, separate but equal, we would not accept it. And so right now all I can see is he has had wonderful coaching from that great Texan over in the White House. I think he has learned to say very little. Newsweek this week said he has been "a master of evasion." But I am worried about that because I believe that the women of this country deserve a fundamental right. I think there is a constitutional right of privacy. I do not want to see it endangered.

He has avoided saying even that an individual has a fundamental right to privacy based on the Due Process Clause of the 14th amendment. I ask you to say no to his nomination.

[The prepared statement of Ms. Weddington follows:]

**Testimony of Sarah Weddington  
Attorney, Austin, Texas  
Before the Senate Judiciary Committee  
On the Nomination of Judge Clarence Thomas to be an  
Associate Justice of the United States Supreme Court  
September 19, 1991**

Mr. Chairman, Members of the Committee, thank you for the opportunity to address you today. My name is Sarah Weddington and I am the attorney who litigated Roe v. Wade.

In 1969, abortion was illegal in Texas, my home state. But that did not change the determination of women in Texas -- like women all across the nation -- to choose for themselves the appropriate response to a pregnancy. Some chose abortion. Those who could somehow get together the necessary money went to states like California or New York for legal abortions. Those who could not had illegal abortions, often in Mexico. Many women died because of that Texas law, and more suffered permanent physical injury.

That year a group of women formed to provide free information about the safest places to go. They were concerned about whether they could be charged as accomplices to the crime of abortion. They asked me, the only woman lawyer they knew, for advice. My offer to do some research led to the case of Roe v. Wade.

Soon it will be twenty years since we celebrated the Roe v. Wade decision, January 22, 1973. Now I fear that Roe will not survive

-- even in its currently weakened state -- until that twentieth anniversary.

I believe that if the Senate confirms Judge Thomas he will vote to overrule Roe and uphold laws as extreme as the Texas law that the Supreme Court struck down in 1973.

I have followed these hearings with great interest, but Judge Thomas's testimony here has been frustrating and unenlightening. What we have learned is that he had wonderful, careful coaching about how to avoid political pitfalls. What we have seen is a nominee who was willing to answer questions only on issues that are politically safe and who was deliberately evasive on the critical issue of a woman's fundamental right to privacy.

Judge Thomas' record, however, does provide clear indications of the views he was unwilling to share during these hearings. I know that this Committee is very familiar with Judge Thomas' record, but I wish to address two specific concerns that I believe members of this Committee have expressed.

First, I would like to address the attempts during the last few days to dismiss concerns about Judge Thomas' record as unfairly based on a single sentence. Of course, I am referring to Judge Thomas' startling praise of an article by Lewis Lehrman on the "right to life" of the fetus as a "splendid example of applying

natural law." One line can be of enormous importance. Few would dispute that the phrase "All men are created equal" in the Declaration of Independence is significant. The true issue is the content of the sentence. The terrifying significance of Thomas' praise for Lehrman's article lies in the extreme position the article takes: the article compares abortion to a "holocaust" and argues that the Constitution requires abortion to be outlawed in every state, under all circumstances.

Imagine if Lehrman had taken a different extreme position in opposition to a basic constitutional principle. What if, for example, Lehrman had said that natural law required the "separate but equal" ruling in Plessy v. Ferguson, and Judge Thomas had praised Lehrman's article calling for racial segregation as "a splendid example of applying natural law." Would anyone on this panel even consider confirming a nominee who had made such a statement unless he had established with both certainty and clarity that he would find unconstitutional a law that would force school children to go to segregated schools? This panel should demand the same certainty and clarity of Judge Thomas given his endorsement of an extreme position that would abolish the fundamental right to choose. To vote to confirm Judge Thomas when he has responded with only evasion would be to treat the right to choose abortion as a second-class right.

Moreover, the endorsement of the Lehrman article is not an anomaly, but is part of a pattern that appears throughout Judge Thomas' speeches and writings. For example, Judge Thomas criticized Roe v. Wade in an article in the Harvard Journal of Law and Public Policy. In the context of exhorting his "conservative allies" to embrace natural law as a tool against "judicial activism," Judge Thomas identified Roe v. Wade as the case "provoking the most protest from conservatives." In another article, Judge Thomas criticized protection of the right to privacy under the Ninth Amendment as an "invention." Judge Thomas also participated on a White House Working Group that called for the overruling of Roe v. Wade. Never, until these confirmation hearings, did Judge Thomas seek to clarify his views or to distance himself from that highly publicized, controversial report. Judge Thomas also referred to the Republican Party's opposition to abortion as likely to attract African Americans to the Republican Party.

Every sign from his record points in one direction -- Judge Thomas, if confirmed, would vote to overturn Roe v. Wade. Judge Thomas' repeated references to the issue of abortion at a minimum undercuts the credibility of his statement, that he has no opinion on Roe v. Wade and has never debated the contents.

Second, I would like to respond to the suggestion by some that Judge Thomas' testimony somehow addressed the grave concerns raised by this record. Far from being reassuring, Judge Thomas' carefully crafted and evasive answers raised new, very serious issues of credibility.

In particular, a careful reading of the transcript reveals that in his responses to Senator Biden's deliberate and repeated questions, Judge Thomas avoided saying even that an individual has any fundamental right to privacy including the right to use contraception, that is based on the liberty/due process clause of the Fourteenth Amendment. Judge Thomas struggled to give the same answer that Justice Souter gave last year, by referring to the Equal Protection Clause basis for the Court's holding in Eisenstadt v. Baird. In response to a question by Senator Heflin, Judge Thomas summarized his responses to Senator Biden's first round of questions concerning Eisenstadt as follows: "the right of privacy that applied to non-married individuals in the intimate relationship was established using equal protection analysis under Eisenstadt v. Baird." Even during Senator Biden's second round of questioning on this point, when pressed hard for a simple yes or no answer, Judge Thomas qualified his affirmative response by saying, "I have expressed on what I base that, and I would leave it at that." I do not believe that Judge Thomas' responses can fairly be interpreted to provide any meaningful reassurance that he recognizes a fundamental right of individual

privacy independent of the equal protection analysis in Eisenstadt.

At a minimum, Judge Thomas' testimony provides absolutely no reassurance on the one aspect of the right to privacy which he repeatedly refused to discuss: the fundamental right to choose abortion. Moreover, although his testimony in many respects echoes the testimony given by Judge David Souter, Judge Thomas' record is strikingly different and clearly indicates his hostility to the right to choose. While some Senators may have given Judge Souter the benefit of every doubt, Judge Thomas' record leaves no room for ambiguity.

I was not a likely candidate to be the lawyer in a very controversial case. I am the daughter of a Methodist preacher; was raised in small Texas towns like Munday, Canyon and Vernon; and in high school was President of our Future Homemakers of America chapter.

But I, like most women of my generation, questioned the limits placed on women and reacted with conviction when faced by discrimination. I played high school basketball at a time women were allowed only two dribbles and had to stop at half court. I did my practice teaching at a time pregnant teachers had to quit work. My college dean told me I shouldn't consider law school because no woman from McMurry College ever had and it would be

too difficult. After law school, I had a similar experience to that of now-Justice Sandra Day O'Connor and was unable to get a legal job with a law firm. When I applied for credit, the store manager told me I had to get my husband's signature even though I was putting him through law school. I discovered just before I argued Roe that there were no restroom facilities for women in the lawyer's lounge in the Supreme Court building.

As we worked to end blatant discrimination against women based on out-dated and false stereotypes, we realized that women could not truly make the decisions that most affect their lives -- about education, employment, family size, finances, and physical and emotional health -- unless they were able to decide when and under what circumstances to bear a child.

We did not fight anti-abortion laws because we were "for" abortion. We did so because we believed it was individuals -- and not the government -- who should make the most fundamental decisions of their lives.

We all know that if the Supreme Court overturns Roe, the affluent and people like us will find the money to travel and be able to obtain safe procedures. The poor and women of color will be those most adversely affected, just as was true pre-Roe as my University of Texas colleague Professor Mark Graber points out in his paper, "The Ghost of Abortion Past."

I would like to see the diversity of Americans reflected by those who serve as Justices, but how sad and ironic it would be if Justice Marshall, a champion for all who suffered unequal treatment, were to be replaced by a man whose presence on the Court helped to end the principles for which Justice Marshall fought.

The CHAIRMAN. I thank you very much. I must tell you it is obvious you argued before the Supreme Court. You are the only one in the last 74 days that came in under the 5 minutes. Thank you very, very much.

Ms. Michelman.

#### STATEMENT OF KATE MICHELMAN

Ms. MICHELMAN. Thank you, Mr. Chairman, Senator Thurmond. I very much appreciate the opportunity to talk with you today.

Senator THURMOND. Speak into your machine, if you could, just a little bit louder.

Ms. MICHELMAN. My machine. I always have an aversion to machines.

I thought very long and hard about the focus of my testimony today. During this process, I think we must remember a very simple truth: What is decided here will profoundly affect the lives of millions of Americans outside this hearing room—Americans who depend on you to protect their most cherished rights and liberties. Among them are the countless desperate women who, prior to *Roe v. Wade*, were deprived of their privacy, their dignity, and even their health and their lives. Millions of Americans know firsthand that when we get past constitutional theory, legal precedent, and Court rulings, this confirmation process will determine whether millions of women will be forced, terrified and alone, to face one of the most difficult crises of their lives.

Mr. Chairman, today I must tell you that I was one of those women. I was relatively lucky. I was able to avoid resorting to the back alleys. But I suffered the shame, degradation, and humiliation of being deprived of my right to make one of the most important decisions of my life.

Like most women in this Nation, I never expected to need an abortion. Most women do not. But before *Roe*, I faced the trauma of a crisis pregnancy. I was raised Catholic, married young, and as a young woman I had three wonderful daughters in 3 years. But in 1970, my husband suddenly announced that he was leaving me and the children.

I was devastated. Without money, a job, or a car, I was even unable to get a charge account at the local five-and-dime because I was not married any longer. I was also very ill at the time. My self-esteem was destroyed. My entire world was shattered, and my family was forced onto welfare.

Almost immediately after my husband left me, I learned that I was pregnant. With three children under the age of six, I alone had to meet their every need—financial, emotional, and physical. The very survival of my family was at stake. Indeed, my family was at risk of being split apart.

Because abortion was largely illegal at the time, I had to struggle with this decision all by myself, all alone. Deciding whether or not to have this abortion was probably one of the most difficult and complex decisions of my life. It challenged every religious, moral, and ethical belief I had. But I looked into the eyes of my three daughters and made what I think was one of the most moral decisions I have ever made.

It was at this point that I became painfully aware that having another child would have made it absolutely impossible to cope with an already desperate situation. I am certain that my family would not have survived intact.

But in 1970, you know, the Government did not allow me to make this decision for myself. I was forced to appear before a hospital-appointed panel of four men. These complete strangers cross-examined me about the most intimate and personal details of my life. It was humiliating. I was an adult woman, a mother of three, and yet I had to win their permission to make a decision about my family, my life, and my future. And I alone would have to live with the consequences of their decision.

But, finally, they granted me their permission. I was admitted to the hospital. Yet as I awaited the procedure, I was told by a nurse that they had forgotten one more legal requirement.

I would not be able to have the abortion without written permission from the man who had just deserted me and my children. I literally had to leave the hospital and find the man who had rejected me and ask his permission. It was a degrading, dehumanizing experience, an assault to my integrity, my dignity, and my very sense of self.

At all times during this process, I carried with me the phone number of an illegal abortionist. And if at any juncture I was thwarted in my attempt to have a hospital abortion, I was prepared to break the law and risk my life because my family's survival depended on it.

Mr. Chairman, Senators, perhaps now you can begin to understand the pain and anger I feel when I hear the right to choose dismissed as a mere single issue. This right is absolutely fundamental—fundamental to our dignity, to our power to shape our own lives, to our ability to act in the best interests of our families. No issue—none—has a greater impact on the lives and futures of American women and their families.

The record shows that, if confirmed, Judge Thomas would indeed vote to take away this fundamental right—to take this Nation back to the days when women had no alternative but the back alleys for health care. What happens in the halls of Congress must reflect what is in the hearts of the American people. This may be one of the last opportunities you have to stand up for a woman's fundamental right to choose before *Roe v. Wade* is ultimately overturned. I urge you to refuse to confirm Judge Thomas.

[The prepared statement of Ms. Michelman follows:]



**TESTIMONY OF KATE MICHELMAN**  
**EXECUTIVE DIRECTOR, NATIONAL ABORTION RIGHTS ACTION LEAGUE**  
**BEFORE THE SENATE JUDICIARY COMMITTEE**  
**ON THE NOMINATION OF JUDGE CLARENCE THOMAS**  
**September 19, 1991**

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Mr. Chairman, Members of the Committee, I thought long and hard about what the focus of my testimony should be. During this process, we must remember a very simple truth: What is decided here will profoundly effect the lives of the millions of Americans outside this hearing room -- Americans who depend upon you to protect their most cherished rights and liberties. Among them are countless desperate women who, prior to Roe v. Wade, were deprived of their privacy, their dignity, and even their health and lives. Millions of Americans know firsthand that when we get past constitutional theory, precedent and Court rulings, this confirmation process will determine whether millions of women will be forced, terrified and alone, to face one of the most devastating crises of their lives.

Mr. Chairman, today I must tell you that I was one of those women. I was relatively lucky. I was able to avoid resorting to the back alleys. But I suffered the shame, degradation and humiliation of being deprived of my right to make one of the most important decisions of my life.

Like most women, I never expected to need an abortion. But, before Roe, I faced the trauma of a crisis pregnancy. I was raised Catholic and, as a young woman, I had three wonderful daughters in three years. But in 1970, my husband suddenly announced that he was leaving me and the children.

I was devastated. Without money, a job or a car, I was even unable to get a charge account at the local five and dime. I was also very ill at the time. My self-esteem was destroyed, my entire world was shattered, and my family was forced onto welfare.

Almost immediately after my husband left me, I discovered that I was pregnant. With three children under the age of six, I alone had to meet their every need -- financial, emotional and physical. The very survival of my family was at stake.

Because abortion largely was illegal, I had to struggle with this decision alone. Deciding whether or not to have an abortion was one of the most difficult and complex decisions of my life. It challenged every religious, moral, ethical and philosophical belief I had. I looked into the eyes of my three daughters and made what I think was one of the most moral decisions I have ever made.

But, in 1970, the government would not allow me to make this decision for myself. I was forced to appear before a hospital-appointed panel of four men. These complete strangers cross-examined me about the most intimate and personal details of my life. It was humiliating. I was an adult woman, a mother of three, and yet I had to win their permission to make a decision about my family, my life, my future.

Finally, they granted me their permission. I was admitted to the hospital. Yet as I awaited the procedure, I was told that they had forgotten one more legal requirement.

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At all times during this process I carried with me the name and phone number of an illegal abortionist. If at any juncture I was thwarted in my attempt to have a hospital abortion, I was prepared to break the law and risk my life because my family's survival depended on it.

Mr. Chairman, Senators, perhaps now you can begin to understand the pain and anger I feel when I hear the right to choose dismissed as a mere single issue. This right is absolutely fundamental: Fundamental to our dignity, to our power to shape our own lives, to our ability to act in the best interests of our families. No issue has a greater impact on the lives and futures of American women and their families.

The record shows that, if confirmed, Judge Thomas would vote to take away this fundamental right -- to take this nation back to the days when women had no alternative but the back alleys for health care. What happens in the halls of Congress must reflect what is in the hearts of the American people. This may be one of the last opportunities you have to stand up for a woman's fundamental right to choose before Roe v. Wade is overturned. I urge you to refuse to confirm Judge Thomas.

The CHAIRMAN. Thank you very much, Ms. Michelman.  
Ms. Wattleton.

#### STATEMENT OF FAYE WATTLETON

Ms. WATTLETON. Mr. Chairman and members of the Judiciary Committee, I am indeed honored and I appreciate the opportunity to appear before you today in my role as president of Planned Parenthood Federation of America and the Planned Parenthood Action Fund. For 75 years, as advocates and providers of reproductive health care, Planned Parenthood has empowered tens of millions of men, women, and their families to have control of their lives—enabling individuals to make informed decisions about reproduction and to obtain quality medical services to prevent unwanted pregnancies.

Precisely 1 year ago, this committee heard Kate Michelman and I ask you solemnly to reject now-Justice David H. Souter, and we heard him in the introduction to his appearance before you indicate that he believed in making the “promises of the Constitution a reality for our time, and to preserve that Constitution for the generations that will follow us.” We too believe that such a living document as the Constitution must be nurtured and preserved. And yet with Mr. Souter’s ascension to the Court, we do stand at the precipice of the reversal of one of the most important rights that American women have attained and have had recognized in this century.

Mr. Souter refused to answer questions on the substance of the right to privacy in the Supreme Court rulings that have flowed from the right to privacy. In his first opportunity on the Court, he expressed himself in a way that many of us thought unimaginable. In *Rust v. Sullivan*, he voted with the majority in upholding the Federal bureaucracy’s power to enforce speech censorship between a woman and her doctor.

In permitting the Government to prohibit any discussion of abortion in family clinics, the Court in *Rust* struck at one of the most sacred tenets of our liberties—the right to free speech.

The Senate, like the American public, has responded with outrage to the *Rust* decision and has acted boldly to overturn it. But I must say that had the Senate been as bold in insisting that Judge Souter explain his philosophy on reproductive rights, it might have rejected his candidacy instead of leaving American women to hope for the best, and we might not have had the gag rule today.

This year, Americans watched and listened to learn of Judge Thomas’ views on the right to privacy. The committee did not hesitate to press him on other “unsettled” doctrinal questions, nor did he refuse to express his philosophy on those matters. He did not even refuse to answer questions on the full range of privacy. What he did refuse to acknowledge, however, was that privacy extends to my right as a woman to terminate an unwanted pregnancy.

There are those who argue that Judge Thomas should not be forced to answer questions about abortion because other candidates have not been required to do so. But the fact that this committee did not press other candidates on this issue is not a reason to fail to press this candidate on this issue.

A high Court nominee's views on the constitutional right to choose abortion have never been more critical than they are today. The Supreme Court is now heavily weighted toward rightwing extremism, and an upcoming reconsideration of *Roe v. Wade* is virtually guaranteed. If Judge Thomas fully accepts the natural law doctrine as regards fetuses, it would make him more strongly anti-abortion than any other sitting Justice because that doctrine holds that abortion is constitutionally outlawed rather than subject to State regulation.

We fear that if Mr. Thomas is confirmed he will join the others on the Court who have signaled their willingness to dismantle *Roe*. This is the first time in constitutional history that a fundamental right recognized is in danger of being denied.

Prior to these hearings, much has been written about the clear objections that Mr. Thomas spoke on with respect to *Roe v. Wade*, and with his failure to answer the questions on this matter, we have to ask ourselves why.

Mr. Thomas also signed a report that you questioned him about, and he has given his excuse as one that he did not read the report carefully. Well, he had an opportunity to comment on that report, and why did he fail to comment on whether he supported *Roe v. Wade* or the doctrine underlying *Roe v. Wade*?

But even if we give Mr. Thomas the benefit of the doubt, there is absolutely nothing in his record that indicates that he supports *Griswold*, which gave the Americans the right to practice contraception.

Finally, it strains logic that this man who has boldly spoken out on controversial issues also claims that he has never read or thought about the historical *Roe v. Wade* decision, even though he was in law school when it was handed down. His testimony leaves all of us as Americans in a difficult position, both in evaluating his disposition toward the constitutional privacy protection and in evaluating his overall credibility and integrity.

Any Supreme Court nominee who fails to reveal his or her judicial philosophy in this area of established constitutional law or who rejects the fundamental nature of Americans' reproductive rights must likewise be rejected by those who represent us. We urge you to refuse to confirm Clarence Thomas.

[The prepared statement of Ms. Wattleton follows:]

Testimony

by

Faye Wattleton, President

Planned Parenthood Federation of America

and

Planned Parenthood Action Fund

before the Senate Judiciary Committee  
on the nomination of Clarence Thomas  
to the United States Supreme Court

September 19, 1991

Mr. Chairman:

I appreciate the opportunity to appear today in my role as president of Planned Parenthood Federation of America and the Planned Parenthood Action Fund. For 75 years, as advocates and providers of reproductive health care, Planned Parenthood has promoted greater liberty in individual decision making about pregnancy and childbearing. Planned Parenthood has empowered tens of millions of women and their families to take control of their -- lives -- enabling individuals to make informed decisions about reproduction and to obtain quality medical services to prevent unwanted pregnancies. Each year more than 2.4 million Americans -- mostly young, mostly low income -- come to our 911 clinics nationwide for the information and support they need to make the most basic and private decisions about their reproductive lives.

Precisely one year ago this committee heard Judge David H. Souter solemnly proclaim that a Supreme Court justice holds the responsibility "to make the promises of the Constitution a reality for our time, and to preserve that Constitution for the generations that will follow us." We too believe in the Constitution as a living document that must be nurtured and preserved through each generation. Such is its enduring quality. Yet the reality of our generation is that the process of nurturing and preserving our rights and freedoms is being abandoned. For the first time,

established constitutional rights -- specifically reproductive rights -- are in danger of being reversed at the hands of the highest constitutional arbiters of our nation.

It is the constitutional vision and methodology of those potential arbiters that this committee is charged with discerning -- as well as ensuring that the court retains a meaningful diversity of judicial philosophy. There are no guarantees that what a nominee says will govern how he or she will rule on the court; but that in no way obviates the Senate's obligation to determine the candidate's position.

While Mr. Souter last year acknowledged that the Constitution protects marital privacy, he stubbornly refused to answer questions on the substance of that right and the landmark Supreme Court rulings that have flowed from it. Reproductive rights was the only area of questioning in which Mr. Souter demurred.

In Justice Souter's first opportunity to express himself on the issue of reproductive rights as a member of the Supreme Court, he became the fifth vote forming a majority in Rust v. Sullivan, holding that the federal bureaucracy can enforce speech censorship between a woman and her doctor. Rust v. Sullivan upheld the right of the Bush administration to direct what a medical professional can say in a family planning clinic for low-income women. In permitting the government to prohibit any discussion of abortion,

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the court struck at one of the sacred tenets of our liberties -- freedom of speech.

The Senate, like the American people it represents, has responded - with shock and outrage to the Rust decision, and has acted boldly to overturn it. But I must say to you that had the Senate been as bold in insisting that Judge Souter come forward with more candor in explaining his philosophy on the right to reproductive control, it might have rejected his candidacy instead of leaving American women to hope and pray for the best.

I refer to last year's confirmation hearing to underscore the real-life consequences that flow out of this process. A nominee who systematically evades questions on this fundamental issue arrives at the court as a blank slate on an issue of profound importance to women. If he conducted himself similarly on other issues of constitutional law, Americans would be compelled to ask what is the meaning of the confirmation process.

Americans watched and listened to learn of Judge Thomas's views about the constitutional right to privacy. The committee did not hesitate to press Mr. Thomas on other "unsettled" doctrinal questions that are likely to be brought before the Supreme Court, ranging from discrimination law to capital punishment. Nor has he refused to express his philosophy on these matters. He didn't even refuse to answer all questions on privacy. What he did refuse to

acknowledge was that the right to privacy extends to the right of a woman to terminate a pregnancy. What we have seen is another Scouter-type performance.

There are those who argue that Judge Thomas should not be forced to answer questions about abortion because to do so would alienate one side or another in Congress -- and that other candidates for the court have not been required to do so. We believe that the committee should have pressed those other candidates to answer --or should have rejected them for failing to do so.

But the fact that it did not take those actions does not justify excusing Judge Thomas from responding, and the reason should be obvious: A high court nominee's views on the constitutional right to choose abortion have never been more critical than they are today. The Supreme Court is now heavily weighted toward right-wing extremism, as evidenced by numerous recent rulings, and an upcoming reconsideration of Roe v. Wade is virtually guaranteed. If Judge Thomas fully accepts the "natural law" doctrine as regards fetuses, it would make him more strongly anti-abortion than any of the sitting justices, because that doctrine holds that abortion is constitutionally outlawed rather than a subject for each state to regulate. We fear that if Mr. Thomas is confirmed, he will join the ranks of others on the court who have signaled their willingness to dismantle Roe v. Wade. This process began with the Webster decision in 1989 and moved forward last May with Rust. This

is the first time in constitutional history that a right recognized as fundamental is in danger of being denied. Women's lives hang in the balance.

Mr. Thomas has acknowledged a general right to marital privacy. But Justice Souter and Justice Kennedy embraced that same vague view. Before these hearings began, however, it seemed very clear that this nominee had very clear objections to Roe v. Wade and the constitutional principles underpinning it. Why else would he have praised Lewis Lehrman's essay, titled "The Declaration of Independence and the Right to Life," with its references to "the struggle for the inalienable right to life of the child-in-the-womb..." and "the conjured right to abortion in Roe v. Wade"? His explanation to the committee about political coalition-building is insufficient, particularly when such coalition-building takes the form of condemning a decision that has done more than any other of the 20th century to improve the condition of women's lives.

Mr. Thomas went on to sign a report on the family to President Reagan, which sharply attacks a series of Supreme Court decisions - that -- according to the report -- "abruptly strip the family of its legal protections." The decisions specifically cited in this report, in addition to Roe, were Planned Parenthood of Central Missouri v. Danforth -- which struck down a state law giving husbands and parents veto powers over their wives' and daughters'

abortions, and Eisenstadt v. Baird -- which held that unmarried people have a right to use contraceptives. Judge Thomas has stated that he signed that report without reading it. So be it. Many of us have been guilty of signing documents without paying sufficient attention to them. But when we discover a mistake or a public misstatement, a correction or clarifying statement is the minimal norm. Judge Thomas insists, several years later, that he never got around to reading the report, even though it was highly controversial and well-publicized at the time.

Although he seems to have positioned himself otherwise for this hearing by his general embrace of Griswold v. Connecticut, Judge Thomas has previously criticized Justice Goldberg's use of the Ninth Amendment in reaching that decision. This seeming contradiction -- taken in light of his praise for the Lehrman article -- should be fully explained before this body. But even if we give Mr. Thomas the benefit of the doubt, there is absolutely nothing in his record -- in his writings and speeches and court cases -- to indicate support for Griswold. Neither is there anything anywhere, prior to his statements before this committee, to indicate that he is sensitive to, concerned about, or respectful of the privacy right for all individuals to make reproductive decisions, including the choice of abortion.

Finally, it strains logic and stretches the imagination when this man -- who has boldly spoken out on many controversial, cutting-

edge issues -- also claims that he has never read about, discussed, or thought about the historic Roe decision -- even when he has spoken and written about it. Judge Thomas was studying at Yale University Law School when Roe was decided. Is it possible that such a distinguished law school would have failed to foster discussion and broad debate among its students on a major constitutional landmark? His testimony leaves the American people in a difficult position, both in evaluating Judge Thomas' disposition toward the constitutional privacy protection and in evaluating his overall credibility and integrity.

There is no doubt in my mind that if this committee had reason to suspect that a nominee were prepared to overrule Brown v. Board of Education, or New York Times v. Sullivan, it would insist upon answers to clarify the nominee's beliefs and intentions. As an African-American, I fully appreciate the significance that you and the American people attach to the court's decision in Brown. As an American who cherishes the right to free speech, I appreciate as well the significance attached to New York Times v. Sullivan. As a woman, Griswold and Roe are no less important. The right to reproductive privacy -- to determine whether and when to bear children -- is as fundamentally important to the wellbeing of American women and families as we enter the 21st century, as Brown or Sullivan were at the mid-point of the 20th century. All Americans, regardless of gender or race, are beneficiaries of these landmark decisions that have recognized inalienable human rights.

It is unfortunate that he is unwilling to acknowledge their universality, their constitutional soundness, and the rights and freedoms that emanate from them.

Planned Parenthood opposes Judge Thomas's confirmation for the same reasons that we opposed that of Judge Souter. As I testified to this committee last year, our fundamental reproductive rights, as well as the health and wellbeing of American women, are on the line. Any Supreme Court nominee who fails to reveal his or her judicial philosophy in this area of established constitutional law, or who rejects the fundamental nature of Americans' reproductive rights, must likewise be rejected by those who represent us. We urge you to refuse to confirm Clarence Thomas.

The CHAIRMAN. Thank you very much.  
Governor.

#### STATEMENT OF MADELEINE MAY KUNIN

Ms. KUNIN. Mr. Chairman and members of the committee, I thank you very much for giving me the opportunity to join this panel and testify in regard to the confirmation of Judge Thomas as an Associate Justice of the Supreme Court.

My political experience has taught me that in our quest to make just laws, we must constantly remind ourselves of the nexus between the orderly world of public policy and the real world of human beings. It is their faces, as we have just heard from Kate Michelman, and their circumstances which we must bear in mind.

This is particularly true in regard to the ability of a woman to make a personal moral decision on the difficult question of whether to continue or terminate a pregnancy. It is essential to humanize this question, to visualize the anguish, the confusion, the inequity that will result if we continue to erode *Roe v. Wade*.

As a former Governor, I am acutely aware of the unequal burdens that would be born by States if this fundamental right is determined on a State-by-State basis, and I am equally cognizant of the unequal rights that would be meted out to women, dependent on where they happen to live, their access to information, money, and transportation.

It is Judge Thomas' silence on this question that causes such anxiety for so many women, who fear that his ascendancy to the Court will inaugurate a most painful era for American families, in contrast to the post-*Roe v. Wade* era where each has made a decision according to her conscience.

Judge Thomas has indicated that he is sensitive to the effect that the law can have on individual lives when he movingly described the impact of Jim Crow laws on his grandmother and on his grandfather.

What many Americans are asking is: Can he bring this same sensitivity to the contemporary question of reproductive freedom?

Can he understand the humiliation, embarrassment, and fear felt today by a woman who is escorted into a health clinic, past a yelling and threatening mob? Can he understand what it means to be patronized, to be dependent on charity and chance, instead of the equal protection of the law?

As a former elected official, I know that my constituency—you know this as well—would not tolerate any candidate for public office who would not make his or her position clear on this question.

We acknowledge the judiciary is different. We need not exact a pledge on how a judge would vote on a specific case. But neither should we absolve him of all accountability.

I cannot accept the premise that underlies what I have heard, that there is some objective legal truth that will naturally reveal itself, that the answers to the most divisive social questions of our time will emerge if our judges purge themselves of all ambiguity, opinion, and feeling, and focus, without blinking, on the facts.

Frankly, if that were the case, these cases would have been decided long ago.

There are many judges who have a knowledge of the law. That is the easy part. It is the contradictions within the human condition, the agony of ambiguous moral choices, the pain of weighing one truth against another. That is what is hard. And those are the heavy burdens that we ask the highest judges of our land to carry.

I must tell you the very fact that Judge Thomas has succeeded in not clarifying his philosophy on this issue creates a quiet fury in many women. Once again, when it comes to our issues, we find ourselves repeating the ancient cycle of helplessness that women have experienced throughout history. The sense of powerlessness is painful. It is apparent right here in this room where women are not equally represented in the decisionmaking process of this country. We are put in the position of pleaders, asking you to ask our questions for us, to be our standins, to intercede on our behalf.

Once again, our question, central to our lives, the one that women all over this country are asking is not being answered. We have to take our chances. We have to live on hope. We have to believe that silence equals fairness when, in fact, we fear that silence equals just the opposite.

I believe I speak for many women when I say we have a right to a forthright answer on this most wrenching moral issue. And the American people, regardless of their view on this issue, have a right to expect any nominee to the Supreme Court of the United States to describe his or her record and philosophy.

In a democracy, it is a sad day, indeed, when silence assures victory.

I respect that each Senator, after a great deal of thought, will reach his decision on whether or not Judge Thomas has met the basic standard for the Supreme Court.

My conclusion is that Judge Thomas has not provided sufficient information to earn confirmation.

After 2 weeks of hearings, the question remains unanswered: Who is Judge Thomas?

Any nominee to the Supreme Court has the obligation to give that answer to the American people.

Thank you kindly for permitting me to share my views.

[The prepared statement of Ms. Kunin follows.]

TESTIMONY OF MADELINE MAY KUNIN, FORMER GOVERNOR OF THE STATE OF VERMONT, DISTINGUISHED VISITOR FOR PUBLIC POLICY, BUNTING INSTITUTE, RADCLIFFE COLLEGE, CAMBRIDGE, MASSACHUSETTS AND PRESIDENT, INSTITUTE FOR SUSTAINABLE COMMUNITIES, VERMONT LAW SCHOOL, SOUTH ROYALTON, VERMONT.

BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE, SENATOR JOSEPH BIDEN, CHAIRMAN, REGARDING THE CONFIRMATION OF JUDGE CLARENCE THOMAS.

SEPTEMBER 19, 1991

Mr. Chairman, and members of the committee. I thank you for giving me the opportunity to testify regarding the confirmation of Judge Clarence Thomas as an Associate Justice of the Supreme Court.

You have spent months pouring over his record, marshaled squadrons of researchers, and he in turn, engaged his supporters to help him edit that record. You have each done your job exceedingly well, but something has been overlooked.

It is we, the people, who have lost out.

The message is that there is a direct correlation between the amount of information a nominee reveals and the likelihood of his confirmation. Less, in fact, is more.

By stripping himself of past opinions and emotion, particularly in the area of privacy, Judge Thomas hopes to be impartial.

I do not believe it can work.

It is our emotions which give us our humanity, which enable us to empathize with others. That is the essential quality of justice.

I cannot accept the premise that there is some objective legal truth which all naturally reveal itself; that the answers to the most divisive social questions of our time now before the court, will emerge if our Judges purge themselves of all ambiguity, opinion, and feeling, and focus, without blinking, on the facts.

If that were the case, these questions would have been decided long ago. There are many competent Judge who could determine questions of law. That is the easy part.

If is the contradictions within the human condition, the agony of ambiguous moral choices, the pain of weighing one truth against another, that is what is hard and those are the heavy burdens that we ask the highest Judges of our land to carry.

My political experience has taught me that in our quest to make just laws, we must constantly remind ourselves of the nexus between the orderly world of public policy and the real world of human beings. It is their faces, their circumstances which we

must bear in mind.

This is particularly true in regard to the ability of a woman to make a personal moral decision on the difficult question of whether to continue or terminate a pregnancy. It is essential to humanize this question, to visualize the anguish, the confusion, the inequity that will result if we continue to erode Roe v. Wade.

As a former Governor I am acutely aware of the unequal burdens that would be born by states, if this fundamental right is determine on a state by state basis, and I am equally cognizant of the unequal rights that would be meted out to women, heavily dependent on which state they resided in, their access to information, money, and transportation.

It is Judge Thomas' silence on this question that causes anxiety for so many women, who fear that his ascendancy to the Court will inaugurate a most painful era for American families, in contrast to the post Roe v. Wade period, when women have made this decision, each according to her own conscience.

Judge Thomas has indicated that he is sensitive to the effect that the law can have on individual lives when he movingly described the impact of Jim Crow Laws on his grandmother, and the effect of those laws, on the humiliating reference to his grandfather as "boy."

What many Americans are asking is, can he bring the same sensitivity to the contemporary question of reproductive freedom?

Can he understand the humiliation, embarrassment, and fear felt today by a woman escorted into a health clinic, past a yelling, threatening mob? Can he understand what it means to be patronized, to be dependent on charity and chance, instead of the equal protection of the law?

I do not ask Judge Thomas to tell the American people how he would rule on a particular case. I do, however, ask that Judge Thomas share with us his general outlook criteria and approach to this divisive American dilemma.

As a former elected official, like you, I know that my constituency would not tolerate any candidate for public office who would not make her or his position clear on this question.

The Judiciary is different. We need not exact a pledge on how he would vote on a specific case. But neither should we absolve him of all accountability.

I must tell you, the very fact that he has succeeded in not clarifying his views on this issue which is of such great importance to all Americans, creates a quiet fury in many women.

Once again, when it comes to our issues, we find ourselves

repeating the ancient cycle of helplessness that women have experienced throughout history.

This sense of powerlessness is painful. It is apparent, right here in this room, where women are not equally represented in the decision making process of this country.

We are put in the position of pleaders, asking you to ask our questions for us, to be our stand-ins, to intercede on our behalf.

Once again, our question, central to our lives, the one that women all over this country are asking, is not being answered.

We have to take our chances.

We have to live on hope.

We have to believe that silence equals fairness, when in fact, we fear that silence equals just the opposite.

I believe I speak for many women when I say we have a right to a forthright answer on this most wrenching moral issue of our time.

The American people--regardless of their view of this issue--have a right to expect any nominee to the Supreme Court of the United States to describe his or her record and philosophy.

In a democracy, it is a sad day indeed, when silence assures victory.

I respect that each Senator, after a great deal of thought, will reach his decision on whether Judge Thomas has met a basic standard for the Supreme Court.

My conclusion is that Judge Thomas has not provided sufficient information to earn confirmation.

After two weeks of hearings, the question remains unanswered, who is Judge Thomas?

Any nominee to the Supreme Court has the obligation to give that answer to the American people.

Thank you most kindly for permitting me to share my views.

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The CHAIRMAN. Thank you, Governor. Every time I hear you speak, I am reminded why you were the Governor and why I wish you still were Governor or Senator. I keep trying to convince Leahy of that, but I have not worked it out yet. But, seriously, I am always impressed when I hear you speak.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I want to join in welcoming an extraordinary, distinguished panel of witnesses and to commend them for brief, but very moving and compelling testimony. It really says something, I think, when we have distinguished individuals who have lives of accomplishment and achievement have to come before the committee and talk about very personal aspects of their lives. People do not do that very willingly, because privacy is something which is highly regarded and protected. In order to make a point to have to describe that, I think all of us are very moved by that presentation.

Now, Judge Thomas had indicated that he had no agenda, that he was going to be openminded, that he had a regard for precedent. I think when he was being pressed on, I think it was probably on the *Griggs* case, indicated that something that was in law for 17 or 18 years had a very important precedent in his own mind, that he was reluctant to see unsettled law.

I would think that perhaps people that were not looking for the overruling of *Roe* could find different wisps during the course of the period of his testimony to get some degree of belief that maybe he would not, and yet there are a series of both the Lehrman speech that he made in reference to Lehrman's presentation and other comments that he made prior to these hearings on privacy and other issues that would lead people to believe that he would. So, as was pointed out by virtually all the panelists, it really is very much an open question.

Tell me, just to the extent that you can—I think probably a few people could do a better job—if that decision is overturned, what really does that mean in terms of the lives of women and families in this country?

Ms. WEDDINGTON. There is an article by one of my colleagues at the University of Texas, Mark Graver, called "The Ghost of Abortion Past," and what he really tries to do is point out what it was like before *Roe v. Wade* was decided, in terms of its impact, particularly on the poor and women of color.

I think if *Roe v. Wade* was overturned or seriously damaged, that what you end up with is a situation much like those days of old, where women of means will be able to travel to States or countries where it is legal, but those who are younger, those who are poor, those who are less sophisticated are going to return to some of the illegal and very unsafe methods of abortion. It does not solve the abortion issue.

The second thing is I think it does away with the right of privacy. I think that is important to many Americans, because of the developing nature of intrusion, not just by government, but by other methods, as well, through computers and a lot of other things. We want a sense that we are safe in making those decisions most fundamental to us.

If the right of privacy is overturned, I think that basic sense of safety and who we are in our homes and our own lives in our decisionmaking ability is threatened.

Ms. MICHELMAN. Well, Senator, I think it is difficult for most people to really envision a world without *Roe*. I think most people do not understand what havoc is going to come into play, when or if *Roe* is overturned. It is, as I said in my testimony, the right to choose is so profoundly fundamental to every other aspect of a woman's life, her family's life, that if it is destroyed, her life is destroyed. And I am not trying to be overly dramatic here.

It is just hard to describe how it feels to be utterly powerless to make a decision that has such a profoundly all-encompassing effect on not only the woman's life itself, whether she is able to have a job, whether she is able to continue her education, whether she is able to support the children she already has, but that decision affects her economic well-being, her physical and emotional well-being, her family's privacy.

One of the untold stories prior to *Roe* is the story of the numbers of children who were left motherless, because of the deaths of women from illegal abortions or self-induced abortions. It is a world that we do not want to contemplate, honestly.

People say sometimes to me, oh, you are exaggerating, there won't be a back alley abortion industry like there was before *Roe*. Well, they are wrong. The same people who push drugs on our children and our society are the same people who are going to try and take advantage of the desperation of women who face crisis pregnancies.

I think that there will be nothing but chaos in this Nation, when *Roe* is overturned, and I think that is why this right is so fundamental and we must require that Judge Thomas acknowledge that right, or he should not sit on the highest Court of the land.

Ms. WATTLETON. I am a nurse and I am, by profession, a nurse midwife and I was trained in the years when abortions were illegal in this country. I can never forget the desperate faces of healthy young women who suffered from the injury of illegal abortion. I can never forget the odor of infection as these women entered the hospital as a result of various objects being inserted into their vaginas and into their uteri to effect an abortion.

It is for that reason that I do not want to see women face that kind of degradation again. Mostly, I know that those were poor women and that those were my sisters, African-American women, and so I have a very personal and passionate interest in preserving the right for women to have safe, legal abortions that do not kill them.

There is much that is given to romancing the notion that abortion, if given to the States, will not be illegal, and that, anyway, States are involved in a reform process that the Supreme Court decision in 1973 took away from them.

A closer reading of the history will reveal no such evidence. In fact, after a few States in the early 1970's legalized their repressive laws, no other States were able to move, repeal, or reform legislation, and even in those States where there had been some reform, the rules for a woman to get through in order to have a legal abortion were formidable.

So, the notion that States will somehow allow women to have reasonable access to safe abortion is really fantasy and is not reflected by the evidence of history. I think it will once again be a time in which abortion will largely be unavailable to women and that the first to suffer will be poor women and minority women, and affluent women will face the humiliation of engaging in underground and illegal activities, but perhaps they will escape with their lives and their bodies intact.

Ms. KUNIN. Senator, as I try to envision a post-*Roe v. Wade* world, I think the clock would not just go back to pre-*Roe v. Wade*, because before *Roe v. Wade*, while there were many courageous people who had to seek abortions by whatever ways they could, basically, the law of the land did not permit it.

What we have had for the last almost 20 years is that the law within the limited guidelines of *Roe v. Wade* make abortion legal and safe, so you have really had to see change in our society that is very, very profound and has affected women's lives in every possible way, with a true ability to decide when and how many children to have. Women could make other decisions as to their economic standing, their equality as human beings in general, and by eroding or reversing *Roe v. Wade*, I think it will create a kind of tension, a kind of anger, a kind of explosion that we do not fully appreciate.

I do not think this country has in the past taken away rights that it has once previously granted, and to push the clock back I think will create an internal battlefield that will be very, very painful.

Now, in addition to that, I believe the practical impact from the States level will be that you will probably have violence of opportunity to have illegal abortion and you will have islands where it is impossible to have an abortion.

Vermont, I am quite confident, would maintain that right. In fact, we had a case even before *Roe v. Wade*, that Senator Leahy is very familiar with, that made abortion within certain limitations legal.

Louisiana we certainly know today would not. Massachusetts might or might not. Pennsylvania will not, as indicated by the laws they have passed. So, you are going to have tremendous confusion, you are going to have a tremendous distraction in this country from some of the other issues that we should be dealing with, the poverty issues, the housing issues, the other domestic issues. I think there will be a very wrenching and unfair time.

Senator KENNEDY. Thank you very much, Mr. Chairman. My time is up.

The CHAIRMAN. Thank you.

Senator Thurmond.

Senator THURMOND. I welcome the distinguished ladies here today. I have no questions.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I was not here when the testimony began. I was at another matter involving Senate duties and was unable to be here, but I listened to every word of the testimony right up to seconds of the time I came through the door, and I was quite moved by it.

Ms. Weddington and Ms. Wattleton, you spoke of the various answers Judge Thomas gave, and I believe you referred to a couple of answers he gave to questions of mine, including his incredible answer, when I asked him whether he had ever discussed the landmark case of *Roe v. Wade*, and he said he had no recollection of ever discussing it. I reminded him that this came down when he was a law student, and he said, as a married, working law student, he did not have time to hang around after class and discuss things.

I reminded him that I, like most members of my class at Georgetown, were also married, working, holding down several jobs, in fact, but at least between classes we discussed cases. But be that as it may, I found it even more incredible that he had never discussed it, according to his testimony, in the 17 years since the case came down. He is probably the only lawyer in the whole country that could make that claim.

I then found it even more amazing, because of his statements on the Lehrman article, and that bothered me, but he talked in his testimony about the hushed whispers of illegal abortions that he heard as a child.

Ms. Michelman, that brings me to your testimony, which was among the most powerful testimony we have heard before this committee, I suspect not testimony that you gave easily or without some significant emotion and consideration, both for yourself and for your daughters.

It reminds me of the days before either Governor Kunin or I were really involved in politics, when I was a prosecutor in Vermont, and at that time it was before the case of *Bartlett v. Leahy* and *Roe v. Wade*—not *Bartlett v. Leahy*, but *Beechan v. Leahy* and *Roe v. Wade*, which made clear that it would be a woman's choice in this most difficult choice, and not a legislative body or prosecutors or anything else.

I had occasion to prosecute, as I have told some of you before, in fact, mentioned at Judge Souter's hearing, occasion to prosecute abortion. There was a case where I got called in the middle of the night to come to a medical center then called the Mary Fletcher Hospital, where a young woman had nearly died. She was in the emergency room hemorrhaging from a botched abortion. The abortion had been performed by a woman in Montreal. She had learned how to perform these abortions while working as a nurse for the S.S. at the Auschwitz Prison Camp in World War II.

But she was brought there by a man in Burlington who would arrange these abortions, then blackmail the women subsequently, either for money or for sex. This was the first time that we had been able to get a witness who would testify about him, testify to what some of us had heard as rumors before. I successfully prosecuted him and he went to prison. I do not remember what his prison term was. Whatever it was, it was not enough, as far as I was concerned. There is no prison term that would be long enough.

I wonder sometimes—and this is not a question for any of you, because I know the answer and all four of you have stated eloquently your feelings—I wonder, as I sit here this morning, we talk about this being a single issue thing, and it has been said it is not, it is an overriding, very major issue to all the women of this country—I wonder if sometimes when we are here, we deal with this as

such an abstraction, you on this side or you on that side, which banner do you march under.

That is why I was concerned with Judge Thomas' answers. I told him in my opening statement and during this hearing that he could decide whether to answer or not answer, that is his decision, but that it would be my decision on the advise and consent powers that I have.

I do not expect someone to agree with me on every issue, by any means, but an issue like this, I cannot imagine any man or woman in this country that would not have serious and deep-felt concerns, and I cannot imagine any lawyer or anybody with an understanding of the law who would not realize the consequences of going back to the days of the backroom artist.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The Senator from Iowa, Senator Grassley.

Senator GRASSLEY. I have no questions of this panel.

The CHAIRMAN. The Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman. First, I was not able to be here for Ms. Michelman's testimony. I have read it and it is powerful. I do not mean any disrespect to the statements of the other three, but it is a personal experience and it says where we may be going back to.

As all of you have testified, the nominee has been evasive on this question, but when we put the Lehrman testimony there and the fact that he has been nominated by a President who has made a pledge in this regard, when you take the tone of the writings—and I think it is not unfair not that a conclusion can be drawn on this basis, but just as one small piece of the mosaic, the Episcopal Church generally has taken a pro-choice stand. He attends an Episcopal church that has made a crusade out of the opposite stand.

And yet I ran into a woman in the hallway coming down here. She said, "you are going to the hearings." And I said, "Yes." I said, "How would you vote?" and she said, "I would vote for him unless I thought he would be against *Roe v. Wade*, but I think he will support *Roe v. Wade*." Obviously, different people are drawing different conclusions.

On a scale of one to ten, ten being you are certain that he would overturn *Roe v. Wade*, one being that he would be supportive—and this is, I know, just pulling numbers out of a hat, but where would you put him on a scale of 1 to 10, if I may ask each of you?

Ms. WEDDINGTON. Senator, what bothers me is something he inadvertently said in answer to some of this panel's questions. When he said on the Lehrman article, I simply did it to appeal to the audience, he was willing to mislead them about what his true feelings were in order to appeal to them to do something else he wanted. And so it really bothers me because I think he is trying to mislead the people of this country.

I think of so many criminal trials I have sat in on—I have not tried any myself—where all the evidence led you in one direction and then the defendant gets on the stand and has an entirely different story to tell and it is up to the judge and jury to decide which is true.

All of the evidence before he wanted your confirmation was that he was opposed to abortion. I cannot believe what he says here. He has never said, I believe *Roe v. Wade* should be the law; I believe in the right of privacy; it applies to people under the *Roe v. Wade* doctrine. He has evaded and skirted.

I say 10; he will not vote to uphold *Roe v. Wade*.

Ms. MICHELMAN. I would have to agree with Sarah, Senator. I think the evidence is very clear; his record is clear. In all the years he was a policy official, as he describes himself, and was, he spoke out on many issues, and when he spoke about the right to privacy it was always a critical comment, you know, suggesting that the right was an invented right, criticizing *Roe v. Wade*, applying natural law saying it was a splendid example, choosing that one article that is an extreme attack on the right to choose as a splendid example.

He had many opportunities during the years to say something positive. Now, he comes before this committee and he says he has only skimmed the article. He says he signed a report, but he did not read it. He says that, you know, he took an extreme position, but he did not mean it. It is very hard to believe; it just raises serious questions of credibility.

I just do not have any doubt in my mind that if he is on the Court, he will join the others, Rehnquist and Scalia, in moving this Court to overturn *Roe*, and my fear is that he will go much further than any sitting Justice. That Lehrman article suggests that States would have no right to even legislate in the area of abortion; that it would require States to outlaw all abortions even in the cases of life endangerment.

I just do not think he would uphold this fundamental right, and I think this right is so basic and so fundamental, just like the right to free speech, that unless he is acknowledging that right and that it exists in the Constitution—you know, protects that right just like free speech—I just don't think he should sit on this Court.

Senator SIMON. So you give him—

Ms. MICHELMAN. I am a 10.

Senator SIMON. Ten. Ms. Wattleton?

Ms. WATTLETON. I would add to that. My view is that this is not a candidate that would uphold the doctrine that recognized women's rights to the integrity of our bodies. And since Mr. Souter, whom you all expressed your hope would find such privacy residing in the Constitution, has joined the Court and has voted not only to—well, has not been asked to vote on *Roe*, but has voted on something even more extreme, and that is whether Americans' freedom of speech will be restricted by the Government.

And a candidate whom you had high hopes for just a year ago has gone on to say that with respect to Government policy and the intervention of Government, our very thoughts can be controlled and the words that we say can be restricted. It seems to me to leave this in a very unusually charged environment.

So it is within the context of a failure to answer those questions that we are opposing him, and I would add that I believe that he is a 10 and that he would vote with the majority, as he has voted with his political benefactors and has spoken philosophically in their behalf.

I would only ask whether this committee would be willing to trust a candidate if, as Kate has indicated, it was a matter of free speech and he had said one thing before confirmation and left the slate quite blank during confirmation.

One of the points that Mr. Thomas has made which I find very curious is that to decline or to give you some sense of his philosophical views with respect to constitutional protections for reproduction would somehow disqualify him as an unbiased and impartial Justice. If we applied that reasoning, we would have to say that all of the sitting Justices have given us their views on this issue and so therefore they are unqualified to consider future cases in an impartial fashion. It really begs the imagination.

Finally, I would oppose him because he has been so willing to expound on every other subject, including capital punishment, cases that are before the Court right now. So why fail to answer the question on this most important constitutional issue that is so important to my integrity as a woman?

So, as a woman, I would vote against him as a ten, and as representative of an organization that is firmly committed to preserving this right for all women, we would hold that he should not be confirmed.

Senator SIMON. Governor.

Ms. KUNIN. Senator, technically, what we are asked to believe is that silence equals impartiality; that the fact that he has said nothing and declared nothing really asks us to believe that this is a blank slate and that the facts as they appear to him will determine how he will rule.

In effect, that presumes that there is sort of an equal struggle. Both sides are vying to fill up that blank page, but in reality one side has gotten a head start because there is a record and there is evidence of his past beliefs. So what looks like a totally even tug of war for the opinion of this judge really is not. It is already weighted on one side, unless one believes that he totally dismisses everything he has said and written before, and I think few human beings change as much as that.

So in that sense, while one could say, yes, he has not said and we should not presume his conclusion, when we look at the larger picture a conclusion really pushes forth from at least a reasonable perspective.

What bothers me, in addition, is that there is not an acknowledgement that this is a divisive issue that everybody is struggling with on one side or the other, and that the best way to deal with such wrenching issues is to be straightforward with your own views and say, all right, I am going to put them in perspective, but this is generally what I believe, and as a judge I know cannot just act on my beliefs. But at least I think you deal with controversy by acknowledging where you stand to begin with and then try to find an equitable solution.

Senator SIMON. And give me a numerical—

Ms. KUNIN. I guess I would put it at nine; I would give him one line that he might have some other perspective, but all the evidence is certainly weighted the other way.

Senator SIMON. And I see my time is about up, Mr. Chairman. I would like to put into the record an article that appeared in the

New York Times about 4 weeks ago, about the experience in Brazil. Brazil outlaws all abortions. The second leading cause for women coming into the hospitals of Brazil—the second leading cause of anyone coming in, men and women, is botched abortions in Brazil.

And if I had additional time, I would have asked the witnesses if they believe, if we overturn *Roe v. Wade*, we are going to reduce the number of abortions in our country. I think the evidence is pretty overwhelming from Brazil, as well as in the United States, prior to *Roe v. Wade*. England, Scotland and Wales had much more liberal abortion laws than we did, had far fewer abortions per thousand people.

The evidence is that the culture and other things determine the number of abortions rather than the law, and the question we face in part in this nomination, not the sole question, obviously, is whether abortions will be safe or not safe.

Thank you, Mr. Chairman.

[The aforementioned follows:]

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HEADLINE: Brazil Abortions: Illegal in Name Only

BYLINE: By JAMES BROOKE, Special to The New York Times

DATELINE: RIO DE JANEIRO, July 20

**BODY:**

In a hillside shantytown here, Selma, a 46-year-old cleaner, has a personal reproductive history that seems out of character for Brazil -- three children and 13 abortions.

On paper, abortion is illegal in Brazil, Latin America's most populous country. In March, a Brasilia jury convicted a woman of having an abortion. In June, the Sao Paulo police raided a succession of underground clinics.

Yet in a startling example of a gulf between law and reality, new estimates indicate that Brazilian women have abortions at a rate equal to or greater than women in the United States, where abortion is legal.

Each year, the United States records roughly 3.9 million live births and 1.6 million abortions. Brazil records about four million births annually and somewhere between 1.4 million and 2.4 million abortions, researchers for the Alan Guttmacher Institute say.

"Although abortion is illegal in every Latin American country except Cuba, induced abortion is being widely practiced throughout the region," Susheela Singh and Deirdre Wulf wrote recently in *International Family Planning Perspectives*, a publication of the New York-based institute. "For every 10 women giving birth, three to four in Colombia and Brazil and two in Peru terminate their pregnancies."

On a recent afternoon at a state hospital serving Rio's shantytowns, a third of the women in the maternity ward were admitted for complications resulting from abortions.

"The poor woman is alone, and she sees herself as without a way to avoid pregnancy," said the director, who asked not to be identified by name. "When she gets pregnant, she resorts to what she sees as the easiest way to solve her problem: abortion."

Even with underreporting of complication cases by hospitals, an estimated 400,000 women are admitted each year to recuperate from abortion attempts. Of these, hundreds die. In contrast, in the United States, about 10,000 women are admitted each year because of abortion complications.

"Complications from abortion are identified as the second largest cause for admission in state hospitals -- and yet society pretends it doesn't happen," said Jose Genoio, a member of the Brazilian Congress from the left-wing Workers Party. Seeking to break the silence, Mr. Genoio has proposed a bill that would allow abortion on request in Brazil during the first 90 days of pregnancy -- the first trimester.

But in a nation that claims to have the world's largest population of Roman Catholics, few politicians are willing to risk the wrath of the church hierarchy by advocating expanded access to abortion.

Technically, abortion is permitted in Brazil in cases of rape or danger to the mother's health.

But judges usually delay issuing orders until it is too late. At the Rainha Silvia Maternity in nearby Itaboraí, a 12-year-old who asked to be identified only as Renata recently became a mother. First, she was raped by her stepfather. Then, she was a victim of the slow-moving court system.

In interviews, health professionals here could only recall two legal abortions performed in this city of six million in the last three years.

"Doctors are terrified of performing an abortion without written judicial permission -- no one will do it," said a prosecutor, Branca Moreira Alves.

Jaqueline Pitanguy, a feminist leader, said, "In the case of rape, the great majority of women have clandestine abortions."

Until a recession hit last year, surveys showed that abortions in Brazil were divided roughly evenly between back-alley abortions and clinic procedures.

"Less women are using clinic services now; more are using the dangerous self-induced methods," said Sarah Hawker Costa, who researches women's health issues at the National School of Public Health.

Although there are sporadic crackdowns, like the one in Sao Paulo last month, Rio's affluent beachfront neighborhoods have an estimated 100 full-time abortion clinics.

"There is a silent acceptance of these clinics, and everyone knows where they are located," said Katherine O. LaGuardia, who studied complications from illegal abortions in Rio de Janeiro in 1988.

"It appears that part of the population uses abortion as a means of fertility regulation," said Ms. LaGuardia, who noted that the women she surveyed in the middle-class clinics had had an average of four to five abortions. Presenting a barrier to poor Brazilian women, the cost of clinical abortions is around \$150 -- roughly double the nation's minimum monthly salary.

Traditionally, poor women turned to neighborhood midwives who attempted to induce abortions with knitting needles, coat hangers or sticks. Rosangela Novaes dos Santos, the Brasilia woman convicted of having an abortion in March, was admitted to a hospital suffering from a hemorrhage caused by a piece of wire left in her uterus.

Without any action expected to allow safe, legal abortions, health experts predict that the abortion rate will remain high until birth-control information and supplies are universally accessible.

Surveys show that 90 percent of Brazilian women who use birth-control pills buy them over the counter at pharmacies, with little or no instruction. Ms. Costa's surveys of women recovering from abortion complications found that 40 percent became pregnant while trying to use some form of contraception, largely the pill.

#### Some Can't Afford Condoms

In addition, condoms sell for 50 cents apiece -- a luxury item for poor people in this country. A new study by the Population Crisis Committee, a private Washington group, says that condoms in Brazil are six times as expensive as in the United States, as a percentage of per-capita income.

A Government family-planning effort, the Program of Integral Assistance to Women's Health, suffers from national budget constraints. Still, Education Minister Carlos Chiarelli recently announced that sex education would start next year in primary schools.

But at the state-run slum clinic where Selma works as a cleaner, neither birth-control devices nor counseling are available.

"Women don't abort because they don't love their children; they do it because of necessity," said Selma, who underwent a sterilization operation after her 13th abortion.

Ms. WATTLETON. Mr. Simon, I would just like to add one piece. I do not know whether that article also mentioned that in all of Latin America illegal abortion is the leading cause of death in women of reproductive age.

Ms. MICHELMAN. One quick addition to Faye's comment. I think the way to reduce abortion is not by taking away the right to choose, but to reduce the need for, to make abortion less necessary through sex education, family planning, contraceptive research. It does not work to take away the right to choose; it just makes women die.

Senator SIMON. And I know my time is up, but we have a million teenage pregnancies each year.

Ms. MICHELMAN. Yes, we do, the highest rate—

Senator SIMON. About 300- or 400,000 of those end up in abortions. We know that if we work on the drop-out rate, we reduce teenage abortions.

Ms. MICHELMAN. That is right.

Senator SIMON. So that there are things that we can do in a constructive way to reduce abortions.

Ms. MICHELMAN. That is right.

Senator SIMON. The difficulty is that many of the people who take the anti-choice stand are the very people who are working against the kind of social programs that would reduce the school drop-outs and that sort of thing.

Ms. MICHELMAN. The need for—that is right.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. I think the points that you all raised are valid. I would like to raise another one and then yield. I am not going to ask any questions, but just make a point. I have heard it often mentioned what Judge Thomas' religious beliefs were and are and what church he attends, and whether that sheds any light on his views.

I want to make it abundantly clear, I think that is absolutely, totally, completely irrelevant as a matter of principle, and I also think it is irrelevant as a matter of fact. There are four practicing Roman Catholics on this committee, three of whom support choice. I would hate to be in the position of, because I am practicing Catholic, someone assuming that I was unwilling to sustain *Roe v. Wade*, were I on the bench. It would be an unfair argument. I think people should be clear about that. It is totally irrelevant, in my humble opinion.

Now, I will yield to my friend from Philadelphia.

Senator SPECTER. Thank you, Mr. Chairman.

Ms. Michelman, your statement of your own personal experience is very powerful. Let me ask you if you believe that a firm commitment by a nominee to uphold *Roe v. Wade* is an indispensable factor for confirmation.

Ms. MICHELMAN. Senator, I think a firm commitment to uphold this fundamental right is as indispensable as a firm commitment to uphold the right to free speech, the right to religious freedom—basic, fundamental rights. And Faye, I think, and I both have said a couple of times that this right is as basic as any of the other fundamental rights that our Founding Fathers elaborated upon, so I do think it is.

Senator SPECTER. I had understood that to be your position. The follow-up question to that is, given the political realities of where the President stands on the issue, and he has had two nominees he has put forward, Judge Souter and Judge Thomas, do you think it is realistic for the President to do more than submit a nominee who, at least on the record, is not committed one way or another? Do you think it is politically realistic to expect the President to submit a nominee who is committed to uphold *Roe v. Wade*?

Ms. MICHELMAN. There is no question that the President, the last two Presidents have adhered to the platform which says that judicial nominations will be used to attain the goal of overturning *Roe*. The last four or five nominations I think have showed us that is true.

What I do think, Senator, is this, that if this committee and the Senate as a whole were to deny confirmation to this man, to Judge Thomas, because he, among things—I think it is not the only reason, but, among other things, he does not acknowledge the fundamental right to choose, it would be sending such a powerful message to President Bush, that we could very likely get a nomination that is a much more moderate person.

Remember when President Nixon nominated Carswell and Haynsworth, we got Justice Blackmun. So, I think it is possible that we could get someone who does not hold such extreme views. I mean the question here is—and this is the way I view Judge Thomas—that maybe the difference between having a Justice on the Court who would uphold the Louisiana and Utah laws, which outlaw all abortions, as opposed to someone like Justice O'Connor, who is much more judicious, if I could use that word, in her approach.

I do think there is a degree of how far this Court is going to go in assaulting our rights. For years to come, as you know, Senator, there are many cases on the right to choose, abortion cases working their way through the judicial pipeline as we speak. You know, whether we are going to have laws that require women to get permission from their husbands or whether we are going to have outright bans on abortion, how far the right to privacy will be cut back is really an issue here.

I think we have to stand up, and even if another nominee does come before us who does not acknowledge the right to choose, then we must not confirm that nominee. This right is so fundamental, so we just have to keep at it.

Senator SPECTER. Ms. Wattleton, you have expressed concern over Justice Souter, and he voted with the majority in *Rust v. Sullivan*, an opinion that I have already disagreed with on a number of grounds in the course of the hearings, and the Congress is moving to change that in terms of a regulation which existed for 17 years which allowed for freedom of speech and counseling as being consistent with the prohibition against the use of abortion as a method of family planning.

Why do you think that Justice Souter is committed to overturn *Roe v. Wade*, because of that decision, in light of the fact that there are many other considerations there, administrative procedure, the regulation process, and so forth?

Ms. WATTLETON. Mr. Specter, I think it does not take a wild imagination to think of a view of a judge who can find no protection in the Constitution for freedom of speech and a family planning clinic on abortion, to not find any protection in the Constitution for the exercise of the decision to have an abortion. It is the extremism with respect to restricting speech that leaves us very concerned, if not doubtful, about that Justice's vote to uphold *Roe v. Wade*, when it is once again tested before the Court.

We were hopeful that Mr. Souter would find that, in all matters, the Government must not restrict American speech, must not gag us, must not allow the Government to impose certain propaganda in family planning clinics, and this particular decision was of the most extreme, because it also encroached upon our right to free speech, and that is why we are very concerned about Mr. Souter's position on the continuing recognition of the right to abortion.

Senator SPECTER. Well, you may be right or you may not be right. I would not conclude that he is necessarily on the other side of the issue. I do not know, but in the event he is watching, and I think there is some interest across the street in these hearings, I would like to say that I think the issue is still open there.

One other brief question, Ms. Wattleton. You commented about the special concern of African-Americans and the plight of the poor women. Would you have some expectation, at least, of Judge Thomas, given his own roots and his concern for African-Americans, would have some special sensitivity to that kind of African-American concern among the poor people of this country?

Ms. WATTLETON. I would hope so, but I am not comforted by this candidate's steadfast refusal to acknowledge them. I, as an African-American, have similar roots to Judge Thomas'. Most African-Americans who have achieved and grew up in the 1950's and 1960's of the South know the pain of discrimination. It was not my grandmother who was refused a toilet in a service station, it was I who was refused a toilet and told to go behind the service station and to excuse myself in a hole, because that is what I was expected to do, as a child traveling through the South with my parents.

So, it brings with me a certain level of sensitivity and commitment, that if I were ever to sit before you for confirmation for any purpose, I would not be able to say that I have not thought about this issue, that I do not know about it, one that has divided the country, that has taken over a city in this country in the State of Kansas for several months now. It really does beg reality to suggest that this candidate is sensitive, truly sensitive to what I feel, as an African-American woman, when I see my life threatened.

I come from similar roots. He is not unique. But the ascension to the Supreme Court of the United States should not be on the basis of our roots, but on the philosophy in which we want to keep and see this country moving. That is really what is at issue here.

Senator SPECTER. Governor Kunin, your testimony has been significantly different from the other three women here today, in that you have specifically stated that you would not ask Judge Thomas for a statement as to how he would decide a specific case. I infer from that that you mean that you would not ask him to decide if he would uphold or reject *Roe v. Wade*.

Ms. KUNIN. I would ask, if I may interject, Senator, what his general views are, not on a specific case that comes before the Court, because I understand that.

Senator SPECTER. I understood you in your statement to look to his general views, and that was to be my next inquiry, and it is this: He has said that he thinks there is a right of privacy in the Constitution, and he has testified that he agrees with *Eisenstadt v. Baird*, that there is a right on unmarried people for contraception, and he has gone some distance, although not as far as some would like, in accepting the right of privacy in contraception for unmarried people. How far would he have to go, short of a commitment to uphold *Roe v. Wade*, to satisfy you?

Ms. KUNIN. I think he could go a great distance, without commenting on a specific case. For example, even on the death penalty, he used the words "I don't think I would have trouble deciding or dealing with the death penalty," which even in those few words indicated to some degree what his views were.

I think what is most disturbing is that he claims to have absolutely no opinion in terms of the criteria he would use to judge such a case, in terms of his overall philosophy, his values, and acknowledging that this is a very divisive question in this country. So, I am not satisfied that he has come anywhere near giving us an indication of what his values are, what his general criteria are, and that would give us some indication of which general direction he is moving.

Senator SPECTER. Well, he has not stated what he would do with *Roe v. Wade*, and you agree that is acceptable. He has stated that he accepts the right of privacy and he has gone down the road on accepting the right for contraceptives for unmarried people, as well as married people.

The questioning has taken him on quite a number of steps, and, speaking for myself, I would be interested to know just how far, how many of those questions he has to answer to give you the sense of assurance that you are looking for. I understand what the other witnesses have said.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

Ms. WEDDINGTON. Mr. Chairman, since I did not use all of my original time, could I make just a few comments?

The CHAIRMAN. Surely.

Ms. WEDDINGTON. First, you see, I think one of the things that is bothering me is that when Thomas was asked what are the most important cases decided by the Supreme Court in the last 20 years, one of them was an employment case and the other was *Roe v. Wade*. How does a person nominated for the Supreme Court say the two most important cases of the last 20 years he has no thoughts about, at least one of them?

The second thing is, while he did mention *Eisenstadt*, he did so only in terms of the Due Process Clause, not in terms of—

The CHAIRMAN. That is not true.

Ms. WEDDINGTON. We can go back and look and, Senator, I will bow to your expertise—

The CHAIRMAN. I have it right here.

Ms. WEDDINGTON [continuing]. But I think we can double-check that.

The CHAIRMAN. You can read the record, if you like, but that is not true.

Ms. WEDDINGTON. He did mention right of privacy, but there are people who would say that simply stops with contraception or other kinds of things, and he has not given us any indication. Now, I do not think you should ask him in the Pennsylvania case, here are the specific three provisions and what do you think about those. I do not think you ought to ask him, Louisiana has these provisions and what do you expressly think about that.

But there is an overarching legal framework that he has given no response to, and, meanwhile, I think women in this country are feeling, as Governor Kunin masterfully capsulized, such a feeling of being in limbo, such a feeling of being Murphy Brown-ed. TV sometimes to me expresses the uncertainties, and if you saw her, her friend came to her and said, "Well, if you're pregnant, I will go with you to that back alley, I'll be there when you're butchered." And Murphy Brown said, "Oh, no, you don't understand, abortion is still legal—I haven't seen the paper today." But it is that sense of hanging by such a slender thread and this is the slender thread.

Ms. KUNIN. I would just like to add one final comment. I would not want you to overly distinguish my testimony from the three other women here. My intent—and maybe I did not state this as clearly—was on a specific case, I think it is appropriate that any nominee to the Supreme Court or to any court, for that matter, not be asked his or her specific views, and that is how I dealt with my appointees when I made judicial appointments, but I was very certain to figure out and ask that they tell me what their fundamental values were and what their thoughts were on the most divisive issues facing our State and facing the Nation. And there is as big difference there. I do not think we should make that into a gray area, that if you do not ask about a specific point of law, that then you can be silent on that enormous space between a specific case and knowing who this person is.

Thank you very much, Senator.

The CHAIRMAN. Ms. Weddington, when I said that is not true, I was not questioning your integrity in making the statement. I could understand how anyone would be confused by his answers, but I asked my staff and I personally went back and got every statement he made on the record relative to *Eisenstadt*, and because I was confused by what appeared to be his initial acceptance of the right of privacy, not equal protection, enunciated in *Eisenstadt*, I asked him after he had been asked questions by my friends on my right about the issue, and he said, on page 48 of the testimony on September 12, "That the Court has found such a right of privacy to exist in *Eisenstadt v. Baird*, and I do not have a quarrel with that decision."

I then pressed him, because I had read from the explicit paragraph, which I do not have in front of me, enunciated in the majority opinion saying that this was as right of privacy. I said, now, comment on that paragraph. I said, "I'm asking you whether the principle that I read to you, which has, in fact, been pointed to and relied upon in other cases, is a constitutional principle with which

you agree, which is that a single person has a right to privacy, not equal protection, privacy, the same right of privacy as married people on the issue of procreation." Answer, "I think that the Court has so found, and I agree with that."

Ms. WEDDINGTON. The language that I was looking at was on the 13th, where he said, "Senator, I think I answered earlier yes, based on the precedent of *Eisenstadt*, which was an equal protection case." Then he comes back and he says, "The question, then, became was there a right of privacy that applied to non-married individuals, and the point I was making"—I am quoting him—"was that the right of privacy in the intimate relationship was established using equal protection analysis under *Eisenstadt v. Baird*," and I think that is where we left it. So, that is what is causing me concern, although I know you have tried very hard and with great dexterity to try to ascertain that.

The CHAIRMAN. If on the Court—if he gets on the Court—he concludes there is no such right, I would have to conclude he is a liar. And they are very strong words. Because I do not know how anyone could read specifically what he just said, what he said to me, as anything else. And I specifically read the quote to Justice Brennan: "A marital couple is not an independent entity with a mind and heart of its own but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child."

Now, what I am going to do is I am going to submit to him a question in writing and ask him to answer me in writing for the record that specific issue once and for all before I vote on his confirmation.

Now I yield to my friend from Alabama who came in.

Senator HEFLIN. I want to ask you maybe just academic questions, but it has been raised and I think some thought should be given to what would be the state of the law, the status of legislative bodies' enforcement, and the general condition of society, under a situation which could arise out of the theory espoused by Lewis Lehrman, in his speech on "The Declaration of Independence and the Right to Life," which has become a part of this issue in answers that Judge Thomas has given pertaining to speeches and positions on this issue. Basically Mr. Lehrman, as I understand it, would advocate that the life of a child about to be born would become an inalienable right under the concept of the right to life. If that were to be constitutionally declared, then what regulations could legislative bodies consider and pass under such a constitutionally declared right by the Supreme Court?

Ms. WATTLETON. Well, I commented on that, and then my colleagues can certainly speak on it. But if you extend Mr. Lehrman's doctrine that Mr. Thomas so enthusiastically supported before his appearance before this committee, Mr. Lehrman's views suggest that there is an inalienable right to life after concept, not just at the time of birth when the Constitution recognizes the protections as such but from the moment of conception. In that case, it would render all State permissibles as unacceptable and unpermissible.

Let me just say that it would not allow any abortions to be performed even at the State level under restricted conditions. So that this doctrine really is the most extreme position with respect to the restriction on the right of a woman to choose abortion and goes far beyond even the current State legislation that places very severe restrictions but does make allowances for certain conditions.

Kate, you may want to comment.

Ms. MICHELMAN. I think Faye said it very well, Senator. That doctrine that is espoused in the Lehrman article goes beyond any holding that any current sitting Justice has articulated. It is, as Faye says, the most extreme view, and it would require that all abortions be outlawed. No State would have any right under that doctrine to even legislate in the area of abortion. It would completely annihilate every woman's right to choose.

It is such an extreme doctrine that it—that is why, by the way—you know, it is not acceptable just to hear him say, well, I just used that article to advance my views on civil rights. That article is nothing but an extreme attack on our right to privacy and our right to choose. And if Lehrman had written that article about natural law to apply to another fundamental right, like freedom of speech, and he had chosen that article as a "splendid example" of the application of natural law, I don't think any of you would allow him to be confirmed unless he were to speak to the issue of the fundamental right to free speech.

You just do not choose an article of such an extreme nature as a throw-away line in a speech and not be held accountable for it. It just does not square. It is really a radical, radical doctrine. It is a very scary doctrine.

Senator HEFLIN. Well, let me ask you this now, just hypothetically: If such a decision were to come down and then legislative bodies did not set forth any punitive sanctions in support of that position, how would it be enforced?

Ms. WATTLETON. It would be enforced because many providers of abortion services would decline to provide them. Doctors would refuse to do them.

Senator HEFLIN. Well, I am assuming that. But, I mean, suppose there was a person that would do it. I think it falls in the sort of a category as school prayer. In effect, in the absence of a legislative body in a State taking any actions to reinforce that position by passing criminal laws or putting some punitive sanction on it, and someone attempted to punish a person who had had an abortion, or punish the doctor or the nurse that are doing it, other than injunctive relief, where would you be? What I am trying to find out is where the status of society and law would be under such a concept.

Ms. KUNIN. Senator, if I may just try to envision such a world, I think you would have the worst of all possible worlds, and that is disrespect for the Constitution itself, because the interpretation of the Constitution would be so out of kilter with the majority view. And to have such a situation where disrespect for the law, disobeying the law, not enforcing the law becomes the law of the land, I think would be a very chaotic period for this country.

Ms. MICHELMAN. Senator, just a quick thought. I am not a lawyer, but I think that this doctrine would say that the Constitution requires treating abortion as murder, under the murder stat-

utes, and that is how the laws would be enforced. If that doctrine is established as law, then abortion would be murder. And murder, then doctors, women, and all who were deemed accomplices would, could be then charged with the crime of murder. Maybe a lawyer here can—

Ms. WATTLETON. I guess the point, however, is that the question raises in my mind, What would it mean in the real-life circumstances of women, and what would it mean for poor women? I think it really begs the imagination to think that there would be States who would not enforce—or legislate restrictions and attempt to enforce them since we now have such activities going on in States even though *Roe v. Wade* has not been overturned. And there would be a tremendous amount of pain and suffering for women in this country.

We could debate it, but I respectfully submit to you, Mr. Heflin, that the right to control my body is, indeed, really central and fundamental to my integrity. It is not quite the same as praying in school. It really is more central to my very being than those issues, and I think that is why we are arguing so passionately on behalf of preserving this right this morning.

Senator HEFLIN. Thank you. That is all the questions I have.

The CHAIRMAN. Thank you very much.

Senator BROWN.

Senator BROWN. Thank you, Mr. Chairman.

I want to commend this panel. It has been one of the most thoughtful and rational and helpful presentations I think we have had in the course of this hearing. You all have shared not only your knowledge but your personal experiences, and I think, it has been most helpful to all of us.

Ms. Weddington, I particularly appreciated your relating your personal experiences. I think there are a good many Americans who simply are not familiar with the struggles women have had to go through. And your sharing your personal experiences I think is most helpful. My mother had law school professors tell her that she was not welcome in their class and women were not welcome in the legal profession. That has been some years ago, but she has never forgotten it. I think it is helpful for Americans to understand what it was like.

Ms. Michelman, I particularly appreciate your sharing your personal, very personal experience. I think it is helpful because it speaks more clearly than I would ever know how to explain how this issue is really one about individual rights and human liberty, that it really relates to the question of whether or not as citizens of society we have our rights protected, whether the individual's rights are paramount.

That does not address the question of whether you like or dislike abortions. It relates to what our Constitution envisions as individual freedoms and liberties, and I think your sharing that personal example is very helpful to people to understand the issue.

I, as I go through the record, am concerned in this area. Through the chairman and others, I think you have shared some very relevant testimony. One thing that has not been mentioned that I did think was of interest, though, was a question and response by Senator Metzenbaum.

Senator Metzenbaum said, "Frankly, I am terrified that if we turn the clock back on legal abortion services women will once again be forced to resort to brutal and illegal abortions, the kind of abortions where coat hangers are substitutes for surgical instruments."

In response, at least in part, Judge Thomas said, "It would, of course—if a woman is subject to the agony of an environment like that, on a personal level certainly I am very pained by that. I think any of us would be. I would not want to see people subject to torture of that nature." And he goes on.

I must say I agree with you the record is less than clear and is of concern, and I think your testimony is very helpful in bringing it out.

Mr. Chairman, you were, I think, kind enough to share with us an observation as a practicing Catholic that Catholics should not be prejudged on this issue; that, indeed, a significant portion of the Catholics that are members of this committee are pro-choice. And I think that is a relevant and a fair observation. I just wanted to assure you that as a practicing Republican the same is true. It is true that our platform is not perfect.

The CHAIRMAN. You are pro-choice? Is that what you are saying?

Senator BROWN. Yes.

The CHAIRMAN. I was not being facetious. I did not know what you meant.

Senator BROWN. But the vast majority of Republicans are pro-choice as well, as I read the polls.

Ms. MICHELMAN. If you could move your President, it would be wonderful. [Laughter.]

Senator BROWN. We are working on it.

I yield back.

The CHAIRMAN. Thank you. I am about to yield to my friend from Wisconsin, not only for the opportunity to question but to chair because he has been kind enough to suggest he would sit in for an hour while I go up and attempt to meet some of my duties as chairman of the European Affairs Subcommittee of the Foreign Relations Committee. I will be back shortly.

Let me, with his permission, before I yield to him for both the opportunity to question and to chair, just make one observation. I think if one were to just read about these hearings and observe the cartoons and others about the hearings, one might think that I understood the Governor's comments to possibly not be accurate as it relates to the requirement, the role, the expectation and the function of this committee. I was interested to see—and I do not know enough about this polling organization, but there is a thing called the Polling Report that is published here in this city, and subscribers pay a certain amount of money for it every year, like other newsletters.

In the CBS-New York Times poll conducted, it reports the poll conducted from September 3 to September 5—and I do not know whether it has changed since then. But when asked "Who do you trust to make the right decision about who should sit on the U.S. Supreme Court, the President or the United States Senate?" All people answering, 55 percent of the people said the Senate and 31 percent said the President.

When asked, when the Senate votes on a Supreme Court nominee—I raise these only because these are issues raised by witnesses as well, and we will hear it later today as well. When the Senate votes on a Supreme Court nominee, should it consider only the person's legal qualifications and background, or along with legal background should the Senate also consider how the nominee might vote on a major issue the Supreme Court decides? On legal only, 39 percent of the American people; issues as well, 49 percent. Roughly half the American people think we should consider the nominee's views on the major issues of the day.

That is my quote. To be more precise, "Consider the nominee might vote on major issues the Supreme Court decides." Lastly, the same poll, CBS-New York Times Poll, when the Senate votes on a Supreme Court nominee, should it consider, along with the nominee's legal qualifications, the person's personal history and character? Seventy-three percent of the Americans said it should, and 21 percent of the American people say it should not.

I think the American people have it pretty right, pretty on the mark across the board on these things, and I think not for the reasons they think Senators are any better qualified to pick a nominee, but I suspect because they understand that it is more likely to be representative of what the American people are thinking about.

I just raise that, and I have one question. The Philadelphia Inquirer, a first-rate newspaper in this country, in my view and I think in everyone else's view, not known for its being a conservative newspaper or a radical newspaper, left or right, in its editorial today, endorsed Judge Thomas, and it says in two of the last three paragraphs, and I would like you to comment on this, if you would:

But our support for his elevation to the Supreme Court doesn't spring from an analysis of his resume or from an awareness that his rejection would be followed by a nomination of another conservative Republican. In part, it is a leap of faith, but we believe Judge Thomas can rise to the occasion. We recommend the Senate go with their hopes and confirm him.

Now, as I ask you to comment on it, keep in mind, I have heard several of you say something I have not found in the record, and I think I sat here for almost every word that Judge Thomas uttered. If I was not here, I walked to the back to go to the restroom or to get a cup of coffee and could watch it on television in the room in there while getting the coffee. I doubt whether there are very many Americans who have been more attentive to what he said than me.

The phrase has been used a number of times that he has extreme views and that he has explicitly endorsed the Lehrman conclusion, when he mentioned the Lehrman article. I, like my friend from Colorado, find his position on this area ambiguous, at best, but I did not find anywhere in the record, and I spent a hundred hours on this, researching every word he ever wrote that I could find before the hearing and listening to every word he said afterwards, where he did anything that remotely approached endorsing the Lehrman article.

I agree, you could go to the issue of whether or not he was being candid, whether or not one should believe him or not believe him, but I did not find anywhere in the record on that issue where he

evidenced extreme views, where, on the face of what he said, was anything extreme or an explicit endorsement.

The only thing I could find was what appeared to be the closest thing to an explicit rejection of the conclusion, and I am trying to find that part of the record I had here a moment ago, with regard to a long discussion about the Lehrman article, which was raised a number of times.

In response to Senator Leahy, on the 13th, on Friday, he said, the last sentence, Senator Leahy, "Do you agree with his"—meaning Lehrman—"his conclusion that all abortion is unconstitutional?"

"Judge THOMAS. The point that I am making is that I have not, nor have I ever, endorsed this conclusion or supported this conclusion."

Ms. WATTLETON. Mr. Biden, the facts do not substantiate his statement, because he did in fact acknowledge the wisdom of Mr. Lehrman's conclusions in his speech.

The CHAIRMAN. Now, let's be precise.

Ms. WATTLETON. Now, we have not—

The CHAIRMAN. Let me interrupt you, now, because this is very important.

Ms. WATTLETON. I know it is, and I will clarify what I have got to say.

The CHAIRMAN. Well, he did not—what he specifically said was, "It was a splendid application of the principle of natural law."

Ms. WATTLETON. But that "splendid application" was that the fetus has an inalienable right to life from the moment of conception, and if that is not at odds or in contradiction to the concept of the woman to make the right and to have the right to make the decision, I fail to understand what is. What I am saying is that he did say that "it was a splendid application." If he did not think that the fetus had an inalienable right to law, then why didn't he select another example in which to build the conservative coalition for civil rights?

We find it highly curious that he would select this particular issue, one that is so contentious in this country, that is so central to women's integrity, to expand on the virtues of Mr. Lehrman's vision of natural law, that in the face of his refusing to answer this committee's questions, not our questions, but your questions about whether he believed that the constitutional protections extended to the right not to procreate can leave us with no other conclusion. He had an opportunity before you to clarify that.

I find no comfort in his desire not to see a woman go through the torture of illegal abortion, because he may believe that she doesn't have to face illegal abortion, but to carry a pregnancy against her will to term, so that was not expounded upon, either.

So, I think that all of these things together force us to reach the conclusions that we have expressed here today.

The CHAIRMAN. I am not questioning your right to make the judgment or your judgment.

Ms. WATTLETON. No, I am not saying that you are.

The CHAIRMAN. I am saying that you are raising the issue of how you arrive at that—

Ms. WATTLETON. I am just giving you the reasoning for why.

Ms. WEDDINGTON. Senator Biden, let me call to your attention the Heritage Lectures publication, "Why Black Americans Should Look to Conservative Policies," and I am reading exactly from it. Mr. Thomas said, "But the Heritage Foundation Trustee Lewis Lehrman's recent essay in the American Spectator, on the Declaration of Independence and the meaning of the right to life, is a splendid example of applying natural law."

The CHAIRMAN. That is exactly "a splendid example"—I mean if it didn't have the sentence "a splendid example of applying the right to life," I would acknowledge—

Ms. WEDDINGTON. But it does, it says "and the meaning of"—

Ms. WATTLETON. No, that is what he is saying, he is saying—

The CHAIRMAN [continuing]. "Of the meaning of the right to life is a splendid example of applying the"—just to make the point, let's assume he explicitly rejected the notion of natural law, which he has not, in my view, but let's assume he had. I could make the same exact statement he made and it be completely consistent with my support of *Roe*. I could say I oppose natural law, it's a bad way to use the Constitution, to interpret the Constitution, but Mr. Lehrman's article expounding on the right to life, it occurring at the moment of conception, it being et cetera, et cetera, et cetera, is a splendid example of applying natural law, and you would, nor no reasonable person could possibly or would possibly draw the conclusion that that meant I supported Lehrman's position.

Ms. MICHELMAN. But you would, Senator—

Ms. WATTLETON. I would?

The CHAIRMAN. You would?

Ms. WATTLETON. Because the adjective "splendid" places a value on the wisdom of that application.

The CHAIRMAN. I see.

Ms. WATTLETON. I think we are not taking issue with the doctrine of natural law, it is how that doctrine is applied that is at issue here.

The CHAIRMAN. I understand that. I don't want to belabor this.

Ms. WATTLETON. It is a splendid example and I think it can only be viewed as very complimentary and supportive.

The CHAIRMAN. I see. If I were trying to make a point that communism is a perfect formula for implementing totalitarian dictatorships, and I said in a lecture, "And Joseph Stalin's application of Marxist-Leninist theories was a splendid example of how they result in totalitarian government," would that be an endorsement?

Ms. WATTLETON. That would be a recognition of the wisdom of Mr. Stalin's application of that theory for that particular outcome.

The CHAIRMAN. I want to make it clear. I don't—

Ms. WATTLETON. And there is no way that we can avoid the word "splendid" is what it means—

The CHAIRMAN. I completely, fundamentally—

Ms. WATTLETON [continuing]. Is that it is an excellent example.

The CHAIRMAN [continuing]. Totally use the word we use here, I disagree with that, I think that is a failure in logic, but I will not pursue it, because I think it comes down to the credibility—

Ms. MICHELMAN. Could I—

The CHAIRMAN [continuing]. Not to whether or not one could say that.

Ms. MICHELMAN. Could I just say one little thought here about this—

The CHAIRMAN. Sure, you can.

Ms. MICHELMAN [continuing]. And then I am going to be quiet. I think the—

The CHAIRMAN. You don't have to be quiet.

Ms. MICHELMAN. The key issue here is how he used it. He used it in the context of urging conservatives to use natural law, and he chose a very specific—

The CHAIRMAN. I don't disagree with that.

Ms. MICHELMAN. Senator, could I ask you a question?

The CHAIRMAN. Sure, you can.

Ms. MICHELMAN. If Lehrman had written an article, and as I suggested earlier, criticizing another fundamental right like the right to free speech, using natural law, and he had said the same thing, trying to use the example of natural law to make an argument to win conservatives—

The CHAIRMAN. Well, he did.

Ms. MICHELMAN. No, but what I am saying is if it were another—

The CHAIRMAN. It didn't help any.

Ms. MICHELMAN [continuing]. If it were another fundamental right, would you dismiss it so easily.

The CHAIRMAN. No, no, no. Look, I just want to make sure we are precise here.

Ms. MICHELMAN. Okay, maybe you're not dismissing it, but—

The CHAIRMAN. You are the most informed panel we have had testify.

Ms. MICHELMAN. I'm not sure about that.

The CHAIRMAN. I am.

Ms. MICHELMAN. I think you have had some wonderful—

The CHAIRMAN. That it, in fact, has been on this specific issue, and I think we are slipping from precision. That is the only point I am making. That is the only point I am making. I am not dismissing it lightly. I would not have spent so much time questioning him on it. I would not have spent so much time going back through the record. I don't dismiss it lightly at all, not at all.

Ms. WEDDINGTON. Senator, what bothered me was when he said, you know, I didn't mean to endorse everything he said, I was just trying to win a point with my audience. It seems to me that he was essentially saying I'm willing to mislead people sometimes or kind of try to nudge them in one direction in a way that isn't really accurate, if it gets me what I want.

So, Senator Heflin, I know you have the article in front of you, what bothers me is that Lehrman comment that says human life endowed by the creator commences in the second or third trimester, not at the very beginning of the child in the womb, saying that is what we adopt. Or on page 2 of his article, where he questions—

The CHAIRMAN. You are talking about Lehrman's article.

Ms. WEDDINGTON. Yes, the Lehrman article—that the right of the sovereign, even if voted by the people to take some other position.

Now, I think your comment, saying what would happen, I do think there will be some States where abortion will remain legal. I think in those States women will have access. But I have difficulty thinking of our country as a place where women, if they live in Louisiana, have much lesser rights than some place else.

I appreciated Senator Brown having read my written comments so carefully, because there were some things in there I wasn't able to say in oral testimony, and what I was trying to point out was the abortion issue was not for abortion. It was an issue that was so integral, it was so inherent in all of the other things we were trying to achieve amidst a background of discrimination, that it was important.

Senator Specter, I do understand his concern about what we think Souter's position will ultimately be. I don't know what he is going to do on the ultimate *Roe v. Wade* issue. What bothered me was that when he was in the *Rust* hearing, he asked the Government's attorney, "do you mean if a woman has a medical condition that makes continuing a pregnancy unwise, the doctor can't tell her?" and the Government said, "Yes, that's what it means, he can't tell her."

We thought from reading his expression that he understood how terrible that would be, and so we were shocked when the decision was as it was.

The CHAIRMAN. You know, as a lawyer, and everyone else should know, it is still left open, if *Roe* is overruled, that States like Louisiana may very well pass a law that not only affects—they have passed a law—that not only affects poor women, but the wealthiest of women, because it may very well say, we in the State of Louisiana conclude that anyone domiciled in the State of Louisiana cannot have an abortion anywhere in the world, without breaking the law—

Ms. WEDDINGTON. That is right.

The CHAIRMAN [continuing]. Which I think would be a horrible step. At any rate, let me yield to my friend from Wisconsin, and I am going to yield him the Chair, as well, so after he questions, maybe he could come up here and take the Chair.

Senator KOHL [presiding]. Thank you very much, Mr. Chairman.

I would like to be certain that I understand where you are on this issue in a fairly conclusive manner. Are you all saying that, with respect to this person or somebody coming after this person, if they do not have a clear expressed position on choice which is positive, that person should not be on the Supreme Court; and that it should be the responsibility of this committee to clearly, without ambiguity, ascertain that position and vote—among other things, but vote particularly on that issue?

Ms. MICHELMAN. We are saying that, Senator.

Senator KOHL. Anybody disagreeing on that?

Ms. MICHELMAN. No, because that—

Senator KOHL. So you don't—I respect your position—but you don't take any inconclusiveness as satisfactory?

Ms. WATTLETON. That is correct.

Ms. MICHELMAN. That is correct.

Senator KOHL. So you are saying that trying to figure out what he did or didn't say when he endorsed Lehrman is almost beside

the point? You want to know particularly and clearly that the person believes in a woman's right to choice? Otherwise, in today's United States of America, that person does not belong on the Supreme Court?

Ms. WATTLETON. That is correct.

Ms. MICHELMAN. That is correct. It is whether he believes or acknowledges, recognizes that there is a fundamental right to choose and that that right is equal in its nature to other fundamental rights, such as freedom of speech, freedom of religion, other fundamental rights.

We don't think that you would confirm someone who might suggest there is not a fundamental right to free speech. This is that kind of right, Senator, and we think the area of law—*Roe v. Wade* is 18 years old now. We think it is as settled an area of law as *Brown v. Board of Education*. And I think Faye and I, last year when we sat here before you with Justice Souter's nomination, said that we believed very strongly that if you had any question that Justice Souter would have any difficulty with the *Brown v. Board of Education* ruling, you would be very concerned about confirming him. We believe that this right is as fundamental and as settled as that case was.

The risk to women's lives is so enormous. It is so enormous. If you take this right away, you take away the very foundation of women's lives and their families' lives. There is nothing left. Everything crumbles around it. It is so fundamental.

And, yes, we think it is absolutely appropriate and fair for him to be judged on this issue, and he has singled out—and Faye again said it very eloquently. He has singled out this one area of law to refuse to talk about. He has talked about other areas of law that are controversial, are before the Court. He has singled out this one. You have to ask why. Is it because if he did speak about it he would not be confirmed?

I mean, he can't—it is no longer acceptable. The Court has moved. The President has really made these nominations based on his commitment to overturn *Roe*, and the last four nominees have shown us that they, indeed, are voting with the others to take away this right.

We have no chance anymore. This may be the last opportunity we have to protect *Roe v. Wade*, that you have, the last opportunity you have in your co-equal role with the President in preserving fundamental rights.

Ms. WATTLETON. I guess I would ask the committee to consider what it would do if a candidate sitting before it held that almost every question that you put to him or her could be found to be constitutional or divisive or in other ways politically laden and decline to give you his or her views on those subjects across the board. It would make a mockery of the whole process of advice and consent. And that is why we do not find it as excusable that he chose this and this question alone, singularly, to decline to comment, but to extend it throughout the process and ask ourselves what would that make of the very process of governance that is set forth by the Framers with respect to the selection and the seeding of the other branch of government at the highest levels people who are selected for the rest of their lives.

Ms. KUNIN. Let me just add, Senator, it is not only the desire to know his views on this question, but the explicit effort he has made to not state his views, that leaves us with a real—we are the only—this is the only question on which you have to live on hope or that you have to have a “maybe yes, maybe no, but most likely no” answer. And I think the fact that this is acceptable or apparently acceptable thus far just seems unfair when, as the other panelists have so eloquently stated, this is as fundamental as other rights.

And it is so easy to take this issue and say, well, you are just interested in a single issue and we shouldn't base this confirmation process on a single issue. And I can understand that. But by calling it a single issue, it diminishes it, and it takes away from its true fundamental worth.

So that is an easy trap, I think, to fall into because we are talking about self-respect here. We are talking about equality under the law. We are really talking about very fundamental principles that are encapsulated in *Roe v. Wade*.

Ms. WEDDINGTON. Senator, just very briefly. I know what we would prefer is not what all the committee members would come out in the same place. But there is a sense in which I think your own constituents hold you accountable for what you know when you cast that vote.

On Souter, I think people could have said he had no record, I looked at the record, I voted based on that, it was a reasonable guess. On Thomas, I think if women—and I don't think it is a conservative or liberal issue. Former Senator Barry Goldwater has said the true conservative position is it is not the Government's business. And no one ever accused him of being liberal. There are certainly a lot of Republican Senators, Republican women, the Young Republicans nationally who have said, “We differ with our official party on that position.” It is not a liberal-conservative, it is not a Democratic-Republican issue. But I think it is an issue that strikes at the heart of who has the right to make certain decisions and that women who feel in jeopardy feel particularly strong about.

And so if they come to you and say you voted for this man and look what he did, what are you going to say back to them?

Ms. MICHELMAN. And his record is more than the Lehrman article that we have been focusing on here, Senator. I know you know that. There is much more to his record. As a public person—and I think Faye and Madeleine, the Governor, would agree—if I were to sign on to a report that I hadn't read, I am not sure how—I would have to be held accountable for that. I just wouldn't.

He has to be held accountable, and his testimony has not been credible in his answers in response to his extensive record. And I said earlier, I think before you came in, he has had many years to comment on many things. And every time he has commented on the right to privacy or the right to choose, it has been derogatory. It has been an assault on the right. It has been hostile to the right. He has never once said anything good.

He has come to the committee now, and he has tried to distance himself somewhat from his record. But I don't think he has done that credibly.

Senator KOHL. Do you want to say something else on this issue?

Ms. WATTLETON. No.

Senator KOHL. I would like to ask you about the constitution of the committee and the constitution of our Senate. As you know, the committee is all male, and the Senate is 98-2 male. What would be the result of this deliberation if this committee were 14 women instead of 14 men?

Ms. MICHELMAN. I think obviously we would love to see more women in elective office, and I think women bring a particular sensitivity to and understanding about the issues. But men do also understand how important this issue is, and many of you sitting here before us have been important supporters in preventing the erosion of the right. And we expect you to continue in that mold. We would love to see half women on this panel.

Ms. KUNIN. I would like to see seven and seven.

Ms. MICHELMAN. Right.

Ms. WATTLETON. I think if this panel represented the American people in its diversity, not only among women but also among ethnic groups and African-Americans, we might have a very different conversation with respect to certain insights and understandings about the nexus of a constitutional law with everyday lives of Americans of all persuasions, including gender.

Ms. KUNIN. Let me just say also, Senator, that not all women obviously agree on this issue.

Ms. MICHELMAN. Right. That is right.

Ms. KUNIN. Not all men agree on this issue. I think the particular perspective that women bring is one that Kate Michelman described earlier; that there is still nothing like personal experience. And so I guess my hope would be that someday, regardless of this issue but on all issues, that we can look forward to a U.S. Congress that is truly representative in terms of both minorities and gender of the people of this country. But in the meanwhile, I certainly commend you for your efforts to be sensitive to these concerns.

Ms. WEDDINGTON. When the President said he had nominated "the best man" he could find for the job, I think that is somewhat questionable. But I thought to myself, he certainly didn't take the best person he could, and I hope he will widen his scope of consideration if there is another vacancy.

Senator KOHL. Thank you very much.

Senator SIMPSON. Thank you, Mr. Chairman.

We have 44 witnesses today and bring a light lunch tonight.

[Laughter.]

Senator SIMPSON. I thank you. I don't even believe I will take the full time. But I think you know—you who work so hard for the cause of choice—that I agree with you on that issue and have all of my public life. And I vote rather faithfully on your side on most of those issues that arise in this area. Always have, and it has never been formed since I got here and wasn't formed because of political campaigns. It was formed from life.

But it has been interesting. We went back and did some research on all of us on this committee who have asked Court appointees of a different administration questions. And every single one of us has just stepped into the dark and said, Do you mean to tell me you won't answer this question on what you would do? Go look at what Eastland said and Ervin when they were trying desperately

to pry out of Thurgood Marshall what he was going to do with the *Miranda* decision, which they didn't like one whit, and Thurgood Marshall was just exactly the same in his response as Clarence Thomas. He said, "It is not appropriate for me to address that issue. It would undermine my ability to decide it."

I think if we can just get through that part of this and just know that that is the way it is. And no matter how important the issue, I just do not believe an issue as broad in scope as a Supreme Court nominee position, where a man or woman would deal with thousands of issues in their lifetime on the Court, should have this test on a single issue, no matter how important that issue is.

I guess, in short, despite the fact that I am certainly pro-choice, Judge Thomas has told me personally that he is undecided on that issue, and I am ready to believe him. Nothing has come before us to show us he is a liar or that he doesn't have integrity and credibility. And I believe his many other qualifications make him worthy of the confirmation.

I do not doubt one whit the sincerity or the intensity of your concern about the issue of abortion. As a practicing lawyer for 18 years, I attempted to assist women who were involved in that terrible personal decision. And I think I can understand how tragic a choice it is, to the extent that any man can. But he told us he was undecided. He explained to us he was not endorsing Lew Lehrman's contention that natural law would prohibit abortion. I think our chairman described that rather thoroughly. Certainly the nominee did. I believe we should trust him on that question. He is clearly undecided.

But let me direct a question to Ms. Michelman and Ms. Wattleton. Why did you not express, you know—there was recently a leadership election in the House of Representatives, Representative Dave Bonior, a very able man, and Steny Hoyer, an equally able man, and here came the issue of abortion. Every time. And it will never go away. It doesn't matter who you put on the Court. This issue will be there for the end of time in its various nuances, but no one is going to allow it to occur where we go to the back alley abortions. That is not what sensible legislators are going to do.

But anyway, David Bonior was elected majority whip, and he was also very much pro-life. Now, that's a position that has a lot to do with your position, and I noticed you said nothing. Was there any reason for that?

Ms. MICHELMAN. Well, Senator, first of all, I did say something.

Senator SIMPSON. Oh, I see. I'm sorry.

Ms. MICHELMAN. I did. I expressed very serious concern about a leadership position being assumed by someone—a key leadership position—assumed by someone who has an anti-choice record and what that would do to moving legislation that would protect our right to choose.

But also, Senator, I was very sensitive to the fact that leadership elections within a congressional—in Congress—is a process inside the Congress, and I am very sensitive to that, and I don't think we should, short of making our views known—and I did make my views known, and they were publicly known—and talked to some Members, I think there is a respect for the right of Members of Congress to elect one of their one, and you know, there is only so

far one should go but there was no question about my view and the importance of that leadership role in the advancement of legislation that would protect our rights. And I made that view known, but I did it, I thought, within the parameters that I felt were respectful of the process.

I would like to comment, Senator, on one thing that you said about "I have been very pro-choice", and you have been. You have been there for us in the past, and recently, and we appreciate that very much. But Senator, everything that you have voted for over the past years is going to be undone and will be undone, and you can't make light of it when you continually confirm nominees to the court who are selected on the basis of their hostility to *Roe* and those nominees get onto this Court and move deliberately to overturn this right. And every one of the nominees at the last five confirmation hearings have shown that that selection was indeed based on the hostility to *Roe* because they have voted to restrict and to limit the right.

So that if you confirm Judge Thomas, then while this right is hanging by a thread, all the work you have done in voting to uphold the right in Congress is a moot point. I mean, he has a record, and your vote is very critical here. You can't dismiss the Supreme Court from what Congress does, and he is going to move to overturn this right, and—

Senator SIMPSON. Well, you see, here is the problem—

Ms. MICHELMAN [continuing]. And we disagree on that. I realize that you think he has an open mind, and Senator, I submit to you that I don't think he has credibly established that he has an open mind. He has a record. You might have been able to say that more firmly about Justice Souter because he didn't have the record, although Faye and I did—

Ms. WATTLETON. Mr. Simpson, in response to your question to me—

Senator SIMPSON. Yes.

Ms. WATTLETON [continuing]. We also spoke to the leadership about our strong concern and opposition to the appointment of a Member of Congress to a leadership position in the House that was so staunchly anti-choice, but again we respected the prerogatives of the House with respect to our role in that process.

I would only comment on your characterizing our concerns around it being a single issue, this single issue. Well, for us it is more than this single issue. We see this as a fundamental issue to our integrity, and that is why it carries with it a much larger dimension than a single issue. We can't say that no reasonable legislator or respectable legislator is going to legislate women to the back alley. Louisiana has already done it.

Ms. MICHELMAN. That's right.

Ms. WATTLETON. And we have examples waiting in the wings to be implemented. We have the evidence before us. We are not prepared to go on a leap of faith with someone who is undecided about my right as a woman to control my body and my life. That should be decided, and a candidate who is undecided is insufficient to sit at the highest Court of the land.

Senator SIMPSON. Let me say that I do hear that, but I certainly would disagree with the statement that these people were placed

on the Court because of a hostility to *Roe*, and that was your exact quote, and that is just not so. No President is just sitting there to pick a person for a lifetime appointment based on one thing that is going to come before the Court. That's a disservice to any President of any party, of both parties. And I personally think that the House Democrats made the same decision that a lot of us will make here—a good person who is qualified for high Government position should not be rejected simply because his or her views on one topic are not in line with one's own.

I guess the real thing is—do you really want to know what makes it all flop around and not work with this issue? It is because of the high drama on both sides. When will somebody cut the high drama that this is the end of the Earth if this happens one way? I get called “murderer” in town meetings. How perpetually absurd. And then you talk in high drama and almost obsessive conduct of the word “murder”. These things do a disservice to the debate. And that is why politicians don't grapple with it very well at all, and Governor Kunin, you are a politician. I know what you do. I know of you. I admire your perseverance. You are the politician on this panel—the only one. And boy, there is a lot of difference between advocacy groups and politicians, I can tell you that. But a September poll, just a week ago, showed us that 85 percent of 1,233 people polled thought abortion should not be a deciding factor in Judge Thomas' nomination—85 percent. Now, we happen to fall prey to those things; polls mean a lot to those of us in this line of work. Another 61 percent felt that Judge Thomas was right not to answer questions on abortion.

I would ask the Governor, the politician, why the American public appears to feel that way about Judge Thomas and the abortion issue itself.

Ms. KUNIN. Well, Senator, let me just, before I answer your question, comment on the question of high drama. I think those of us who have been entrusted with making public policy know that we have to create a rational process and a fair process and that that removes it from some of the drama of life. But I think we cannot for a moment forget that the consequences of our decisions in the public arena are very dramatic and very personal for the people affected—and I am sure you appreciate that yourself in your own views.

But I do not think that this drama has been exaggerated. I think that it is an honest expression of deep apprehension. And I think that women as a group often feel that you can deal with every other issue and give it its full weight, but when it comes to these issues of personal choice over reproductive rights, they are put in a different category. That is why I think you see the debate intensifying on this issue. And the idea that this is only one issue out of many—I agree with you if it were simply a small question, we should not say this is the only thing, and this will determine whether or not you merit our confirmation. But this is a very, very sweeping issue that really addresses women's respect and equality in society as a whole. Whether a woman is treated as a rational, moral person who can make her individual choice, or whether the State has to be the parent and say, “No. We make your choice for

us." On very few issues does the State intervene in an agonizing decision quite in this way.

Why the American public responded in that poll, as you know, it depends how the question is asked. Senator Biden earlier quoted another poll from the Philadelphia Inquirer which indicated, one, which is good news for the Senate, that the country feels by 55 percent that the Senate should have more say than the President over this question, and that issues in fact are important. Now, maybe it was the wording that was different in these polls, but I also think there is a resignation in the American public, and there is a growing cynicism that believes that the process is so orchestrated that their individual voices are not going to count and that both sides are so armed and so skilled in maneuvering this thing that it is already a done deal, and I think some of that is reflected in that answer.

Senator SIMPSON. I think so, and I thank you very much.

Ms. WATTLETON. Senator Simpson, I'd just like to comment on the high drama—

Senator SIMPSON. Yes.

Ms. WATTLETON [continuing]. Because from a personal point of view, when I can forget the high drama of women dying whom I tried to help save and to live, then perhaps I will feel less passionate about this issue. I think that you have had among the most rational discussions and commentary on this issue that have taken place in this country in a long time here this morning, but it is the Court of the land that this committee has selected over the last few years that has opened the political debate of this issue to new heights; the Court that stepped back from *Roe* and *Webster* that has now highly politicized this issue.

Would I prefer to be here talking to you about this today? I'd rather talk to you about how we can get birth control and contraception better organized in this country; how we can get new methods so that women don't have to face unwanted pregnancy—I think that is a more rational discussion—and to leave the moral, ethical and individual situations to American women to try to orchestrate.

Senator SIMPSON. Well, I think that is an extraordinary statement when you leave off those on the other side who talk about the murder of a baby. So there you are. Now, come on, let's be reasonable.

Ms. WATTLETON. Mr. Simpson, I'd very much like to preserve their right not to have an abortion, and the very system that they are fighting against is the system that will destroy their right to practice their religious views as they see fit. And that is the common ground here; we have basic, fundamental disagreements. We are decent, reasonable, American people, and we must be allowed to continue to live in a society in which we can exercise our personal and private morality as we see necessary in our lives.

Senator SIMPSON. Well, everybody gets that right. That's the curious part of it.

Ms. WATTLETON. We want to keep it up.

Ms. MICHELMAN. But we want to keep it, Senator—

Senator SIMPSON. So do they.

Ms. MICHELMAN [continuing]. And I am afraid that this nominee will be the nail in the coffin for this fundamental right.

Senator SIMPSON. Well, I think that's overly dramatic and untrue, based on his testimony.

So I have no further questions.

Senator KOHL. Thank you, and thank you very much. We appreciate your being here this morning.

Senator KOHL. Our next panel is composed of Gail Norton, who is the attorney general of Colorado; Larry Thompson of Atlanta's King and Spaulding; Judge John Kern, representing the Judiciary Leadership Development Council; Barbara K. Bracher of Wilmer, Cutler & Pickering, and Sadako Holmes, of the National Black Nurses Association.

We'd like to have each of you come up here and take a seat at the table. Senator Brown would like to introduce our first panelist this morning.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

I am particularly pleased that Colorado's attorney general has been able to come and testify before us today. Gail Norton is the first woman attorney general in Colorado's 115-year history. She has a distinguished legal background—both her bachelor's and juris doctorate degrees are from the University of Denver. She has extensive years of practice. She was a national fellow for Stanford University's Hoover Institute and in addition has a distinguished career here in Washington in previous years as Assistant to the Deputy Secretary of Agriculture and then later on as Associate Solicitor of the Interior.

She is well-known in Colorado as a person of great integrity and exceptional brilliance, and I particularly appreciate her coming back to share with us her thoughts today.

Senator KOHL. Thank you very much.

Ms. Norton.

**STATEMENTS OF A PANEL CONSISTING OF HON. GAIL NORTON, ATTORNEY GENERAL, STATE OF COLORADO; LARRY THOMPSON, KING & SPAULDING, ATLANTA, GA; HON. JOHN W. KERN, III, JUDICIARY LEADERSHIP DEVELOPMENT COUNCIL; BARBARA K. BRACHER, WILMER-CUTLER & PICKERING; AND SADAKO HOLMES, NATIONAL BLACK NURSES ASSOCIATION**

Ms. NORTON. Thank you.

Mr. Chairman and members of the Committee, and Senator Brown, it is an honor to be here today and personally urge you to confirm Judge Clarence Thomas to the Supreme Court of the United States.

State attorneys general like myself have a vital interest in who sits upon the U.S. Supreme Court because we are involved in almost one-third of the cases that are handled in front of that Court. We litigate issues as diverse as taxation, antitrust, superfund hazardous waste cleanups, and business regulation.

Furthermore, my office is responsible for most of the criminal appeals handled in the State of Colorado, and it is from that perspective that I wish to comment on today's nomination.

Perhaps this is somewhat surprising, but as a prosecutor, I do not desire a pro-prosecution judge. I would like to see a fair one. I

do not advocate unfettered freedom to use coerced confessions, arbitrary and intrusive searches, or draconian punishments. That is, I value justice—not simply securing convictions.

As Attorney General, I am very concerned that we achieve an adequate balance between the rights of the accused and society's interest in effective law enforcement. This balance is critical in a society facing devastating issues of law and order, a drug war, a murder rate of epidemic proportion, and an alarming decline of the respect for property and persons.

The promise of Judge Thomas is that he brings a realistic and balanced perspective on law enforcement. He has expressed his deep concern about crime. Today, we face a world where crime is a constant concern. In an average lifetime, 72 percent of us will see our homes burglarized, and 83 percent of us will suffer a violent crime of either assault, rape or robbery. Crime's most tragic and enduring legacy is the pain, suffering and mental scars of its victims.

The Supreme Court has recently shown a willingness to reconsider the broad sweep of some of its previous holdings. While critics have attacked this trend in apocalyptic terms, it is often simply a return to common sense criminal jurisprudence.

While Judge Thomas has not extensively explained his approach to criminal law jurisprudence, nor certainly should we expect him to reach his conclusions before he becomes a member of the Court. The possibility that he would join with the new Court majority should not be viewed with alarm.

Judge Thomas began his distinguished career as a criminal prosecutor, arguing cases for the Missouri Attorney General's Office. One concern that has been raised about Judge Thomas is his relatively short time on the Federal bench. But of the 105 people who have served on the U.S. Supreme Court, 40 had no prior judicial experience whatsoever. That included John Marshall, Earl Warren, Felix Frankfurter, William O. Douglas, and Byron White. If that list is any indication, Judge Thomas is in superb company.

Judge Thomas' appellate decisions are strikingly careful, thorough and evenhanded. He has adhered to the proper role of a judge, enforcing the requirements of the Constitution and statutes, rather than his own views. All seven of the criminal decisions authored by Judge Thomas dealt with drug offenses. Two of those cases provide an interesting contrast and illustrate the care with which Judge Thomas reviews the decisions and evaluates evidence.

In *United States v. Harrison*, police arrested three men in a van with a substantial quantity of drugs. Two of the men carried guns. The third, defendant Butler, was seated next to some ammunition and wore a bullet-proof vest. All three were convicted of the drug offense and of using or carrying a firearm in committing a drug trafficking crime. Butler challenged his firearm conviction, saying he was not carrying a gun. A unanimous panel of the Appeals Court joined Judge Thomas in ruling that Butler constructively used the firearms of his companions.

In *United States v. Long*, Judge Thomas faced a similar situation. The defendant was apprehended in an apartment that "brimmed with evidence" of drug activity. In that apartment was a firearm unloaded in the seat of the sofa. In that case, Judge Thomas re-

fused to infer that the defendant had constructively or actually used the revolver. This illustrates the way in which he carefully evaluates the difference between the circumstances that he is faced with. He faces cases with unbiased integrity.

I strongly believe he would be fair to both prosecutor and defendant alike. Therefore, I urge this committee to vote favorably on the nomination of Judge Clarence Thomas.

Thank you.

[The prepared statement of Ms. Norton follows:]

COMMENTS CONCERNING THE  
NOMINATION OF JUDGE CLARENCE THOMAS  
TO THE SUPREME COURT OF THE UNITED STATES

by

The Honorable Gale A. Norton  
Attorney General of Colorado

Before the U.S. Senate  
Committee on the Judiciary

September 1991

It is an honor to appear before this committee and urge you to confirm Judge Clarence Thomas to the Supreme Court. State Attorneys General have a vital interest in who sits upon the Supreme Court because we are involved in almost a third of all cases that come before the Court. We litigate issues as diverse as antitrust exemptions, Superfund hazardous waste cleanups, taxation, water quality regulation, sovereign immunity, and interstate water compacts. My office is responsible for most of the criminal appeals in Colorado, and it is from that perspective that I wish to comment on the nomination.

As a prosecutor, I do not seek a pro-prosecution justice, but a fair one. I do not advocate unfettered prosecutorial freedom to use coerced confessions, arbitrary and intrusive searches, or draconian punishments. I do welcome a return to a judicial environment that fosters effective law enforcement, dispenses appropriate punishment, and listens to the innocent victims of crime. That is, I value justice, not simply securing convictions. The promise of Judge Thomas is that he brings a realistic and balanced perspective on law enforcement issues.

Judge Thomas expressed his deep concern about the effect of crime on inner cities in a moving statement:

The first priority is to control the crime. The sections where the poorest people live aren't really livable. If people can't go to school, or rear their families, or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are the

criminals?<sup>1</sup>

Yet Judge Thomas also demonstrates a respect for the rights of the criminally accused, as I will discuss below.

#### TRENDS IN SUPREME COURT CRIMINAL LAW DECISIONS

As Attorney General, I am very concerned that we achieve an adequate balance between the rights of the accused and society's interest in effective law enforcement. Crime has been and will continue to be a central issue for the Supreme Court, and it is a major concern of the public. Very recently the Court has shown a willingness to narrow or reconsider the broad sweep of some previous holdings. While some critics have attacked this trend in apocalyptic terms, it is simply an incremental return to common-sense criminal jurisprudence. This balance is critical in a society facing devastating issues of law and order -- a drug war, murder rates of epidemic proportion, and an alarming decline of the moral spirit of respect for persons and property.

The judicial activism of the 1960s and early 1970s Supreme Court created an imbalance that too often benefited criminals. The rulings of the Court in recent years have begun to rectify this imbalance. This can be seen, for example, in areas of the law relating the application of the exclusionary rule, the availability of federal habeas corpus review of state convictions, and the admissibility of victim impact evidence. Court rulings that increase the certainty of punishment, when consistent with constitutional principles, will help the law enforcement community fight crime.

#### A. Crime Victims

Until very recently, the Supreme Court demonstrated a strong concern for the rights of criminals, while dismissing victims as peripheral to the process. Recently, however, the Court has been reawakened to the notion that the victim is an essential part of the process. For true justice to be dispensed, the victim's suffering and loss must be fully considered in sentencing.

Government spending for law enforcement or corrections is not the most important cost of crime. Crime's most tragic and enduring legacy is the pain, suffering and mental scars borne by its victims. According to the Bureau of Justice Statistics, in an average lifetime, 72% of us will see our homes burglarized, and 83%

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<sup>1</sup>C. Thomas, Black America Under the Reagan Administration: A Symposium of Black Conservatives, Heritage Foundation Policy Review 37 (Fall 1985).

of us will suffer a violent crime of either assault, rape, or robbery.<sup>2</sup>

It is against this tragic background that I voice my support for the Supreme Court's recent trend toward including victims in the criminal justice equation. The most notable example of this in the Court's last term was Payne v. Tennessee.<sup>3</sup> In 1987, the Supreme Court decided in a highly controversial 5-4 decision that most types of victim impact evidence could not be presented to the jury in the sentencing phase of a capital case.<sup>4</sup> Two years later, the Court reaffirmed that position in yet another highly controversial 5-4 decision.<sup>5</sup> Owing to the very strong dissents in those cases, the Court once more decided to look at the issue and this year overturned both prior decisions. The Court advised sentencing courts that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."<sup>6</sup> Justice demands that we listen to the victims. How else can society balance the goals of deterrence and retribution that are a part of criminal sentencing?

#### B. Exclusionary Rule

In 1961 in Mapp v. Ohio,<sup>7</sup> the Supreme Court overruled prior precedent to conclude that evidence obtained by searches and seizures in violation of the Fourth Amendment is inadmissible in state court. The resulting exclusionary rule was premised upon the need for a mechanism to control abuses in law enforcement investigative activity.

The rule gained considerable prominence not because of the protection it afforded the average law-abiding citizen, but because of the safe haven from punishment it gave many criminals. It often freed the criminal because "the constable had blundered," and it often prevented prosecutors from using evidence that was tainted through even a technical violation of search and seizure requirements. The rule thus came under severe attack for punishing

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<sup>2</sup>Lifetime Likelihood of Victimization, Bureau of Justice Statistics Technical Report (1987).

<sup>3</sup>111 S. Ct. 2597 (1991).

<sup>4</sup>Booth v. Maryland, 482 U.S. 496 (1987).

<sup>5</sup>South Carolina v. Gathers, 490 U.S. 805 (1989).

<sup>6</sup>Payne, 111 S. Ct. at 2608.

<sup>7</sup>367 U.S. 643 (1961).

the public interest while effectively placing both the guilty offender and the "blundering constable" beyond the reach of the law.<sup>8</sup>

In the mid-1970s, the Supreme Court began restricting the application of the exclusionary rule.<sup>9</sup> In United States v. Leon,<sup>10</sup> the Supreme Court weighed the competing goals of deterring unreasonable invasions of privacy and "establishing procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth."<sup>11</sup> In pursuit of a balance, the Court created the "good faith" exception to the exclusionary rule.

The Court in Leon refused to suppress evidence obtained on the basis of an officer's good faith and objectively reasonable reliance on a warrant that was later found to lack probable cause support. The exclusionary rule, the Court said, "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."<sup>12</sup> This modification of the exclusionary rule, the Court determined, would not jeopardize the rule's ability to perform its intended functions.<sup>13</sup>

The Court has continued this trend toward using the exclusionary rule only where it serves the substantial purpose of deterring official misconduct, while restricting its ability to frustrate an objective search for truth.<sup>14</sup>

<sup>8</sup>See, e.g., People v. Lowe, 616 P. 2d 118, 125-26 (Colo. 1980)(Rovira, J., specially concurring).

<sup>9</sup>See, e.g., United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule not available in grand jury proceedings); United States v. Janis, 428 U.S. 433 (1976)(exclusionary rule not available in some civil proceedings); Michigan v. DeFillippo, 443 U.S. 31 (1979)(exclusionary rule does not apply when officer relies in good faith on a statute that is later declared to be unconstitutional); United States v. Havens, 446 U.S. 620 (1980)(illegally seized evidence can be used to impeach defendant's testimony).

<sup>10</sup>468 U.S. 897, 906 (1984).

<sup>11</sup>Id. at 900-01 (quoting Alderman v. United States, 394 U.S. 165, 175 (1969)).

<sup>12</sup>Id. at 918-19.

<sup>13</sup>Id. at 905.

<sup>14</sup>See, e.g., New York v. Harris, 110 S.Ct. 1640, 1644 (1990).

### C. Habeas Corpus

Another major area where the transition in criminal law has been demonstrated is federal habeas corpus, which is invoked by state prisoners who claim that "they are in custody in violation of the Constitution or laws or treaties of the United States."<sup>15</sup> It often entails review by a single federal judge of rulings made by several state trial and appellate court judges. State judges, like federal judges, are sworn to uphold the Constitution of the United States. State authorities are naturally concerned about the finality of judgments in criminal cases and are somewhat sensitive to being subjected to what they perceive to be the unwarranted supervisory authority of federal courts. I hope, too, that Congress will soon act to contribute statutorily to the necessary balance of these issues.

Again, it is important to understand recent developments in this area of the law with an eye toward constitutional history. Until World War II, habeas corpus relief was limited to jurisdictional defects in state criminal proceedings. Federal courts eventually expanded it to encompass all claims regarding the constitutional rights of a prisoner.<sup>16</sup> The Warren Court expanded its reach by ruling that state prisoners could come to federal court with claims that they had not raised in state court, unless state authorities could show that the prisoners deliberately bypassed state procedures.<sup>17</sup>

In 1976, the Court began returning to its initial conclusions about the significance of the states' interest in not having their judgments so easily disturbed by federal authorities. In the first of the landmark rulings, the Court disallowed habeas review on Fourth Amendment claims where the state prisoner had a full and fair opportunity to litigate those claims in state court.<sup>18</sup> The following year, the Court barred federal review of claims that prisoners had failed to raise at trial, unless the prisoner could show both "cause" for the failure to timely raise the claim, and actual, substantial "prejudice" resulting from the claimed error.<sup>19</sup>

In 1986, the Court made it clear that, absent the extraordinary case where it was probable that an innocent person was convicted, a showing of actual prejudice arising from the

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<sup>15</sup>28 U.S.C. § 2254.

<sup>16</sup>See Waley v. Johnson, 316 U.S. 101 (1942).

<sup>17</sup>Fay v. Noia, 372 U.S. 391 (1963).

<sup>18</sup>Stone v. Powell, 428 U.S. 365 (1976).

<sup>19</sup>Wainwright v. Sykes, 433 U.S. 72 (1977).

alleged error is not sufficient. To permit federal review, defendants must make a showing of cause to excuse the procedural default.<sup>20</sup> Just this year, the Court required state prisoners to meet the exacting "cause" and "prejudice" standards regardless of the type or timing of the procedural default involved.<sup>21</sup> Also this year, the Court restricted the right of state prisoners to seek habeas relief on grounds that they failed to assert in a prior habeas petition. The Court barred consideration of these new claims unless the prisoners were able to show sufficient cause for the failure to raise them earlier, and actual and substantial prejudice suffered as a result of the claimed error.<sup>22</sup> This rule requires prisoners to raise their claims early, at an appropriate point in the proceedings, rather than encouraging repetitious, dilatory tactics of filing endless petitions based upon every conceivable permutation of the record.

The Court's recent decisions recognize that the states can be entrusted with the great responsibility of protecting constitutional rights. The Framers recognized this in creating a system of government that made federalism a core value.

In summary, it is appropriate for the Court to adopt practical, common-sense approaches to law enforcement, such as these examples. They are based on traditional constitutional interpretation, and they provide defendants with adequate constitutional safeguards. Thus, while Judge Thomas has not extensively explained his approach to criminal law jurisprudence, the possibility that he would join with the new Court majority should not be viewed with alarm.

#### ANALYSIS OF JUDGE THOMAS' DECISIONS

Judge Thomas began his distinguished legal career as a criminal prosecutor, arguing criminal appeals for the Missouri Attorney General's office. Judge Thomas' strong law enforcement philosophy was also much in evidence during his tenure at the Equal Employment Opportunity Commission ("EEOC"). Specifically, as Chairman he implemented a fundamental shift of focus in enforcement philosophy. The previous "rapid charge" approach emphasized negotiated no-fault settlements, wherein the EEOC made no effort to determine the merits of discrimination charges. Both frivolous and meritorious claims received the same treatment. Judge Thomas required the EEOC to investigate each discrimination charge and, if

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<sup>20</sup>Smith v. Murray, 106 S. Ct. 2639 (1986).

<sup>21</sup>Coleman v. Thompson, 111 S. Ct. 2546 (1991).

<sup>22</sup>McCleskey v. Zant, 111 S. Ct. 1454 (1991).

necessary, to litigate.<sup>23</sup> This shifted the focus from generating statistics to credible, effective enforcement of the civil rights laws.

As a federal appellate judge, Clarence Thomas has demonstrated objectivity, restraint, and an innate sense of fundamental fairness. His relatively short time on the federal bench is not especially consequential. It is a nominee's overall character and experience, rather than tenure as a judge, that should be determinative. Of the 105 people who have thus far served on the Supreme Court, 40 had no prior judicial experience whatsoever, including John Marshall, Earl Warren, Charles Evans Hughes, Joseph Story, Louis Brandeis, Felix Frankfurter, William O. Douglas, and Byron White. Nine other Justices had less than two years' experience, including the senior Justice John Marshall Harlan, who dissented in Plessy v. Ferguson,<sup>24</sup> his namesake grandson who concurred in Griswold v. Connecticut,<sup>25</sup> and the great Justice Hugo Black, who early in his career spent 18 months as a police court judge. If the preceding list is any indication, Judge Thomas is in superb company.

Judge Thomas' appellate decisions are strikingly careful, thorough, and even-handed. He has implicitly displayed an understanding of the societal tension created by the need of people to be secure against arbitrary intrusion by the government, on one hand, and the need to be secure from the devastating impact crime can have on their lives, on the other hand. Above all, he has adhered to the proper role of a judge: enforcing the requirements of the Constitution and statutes, rather than his own predilections. His decisions tread neither into the province of legislators on policy issues nor of district courts on evidentiary issues.

All seven of the criminal decisions authored by Judge Thomas involved drug offenses.<sup>26</sup> For example, last year Judge Thomas

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<sup>23</sup>As a result, the number of discrimination charges considered for litigation authorization rose from 401 in fiscal year 1982 to 764 in 1988 and approximately 800 in 1989. The number of cases granted such authorization likewise grew from 241 in fiscal year 1982 to 554 in 1988.

<sup>24</sup>163 U.S. 537 (1896) (endorsing racial "separate but equal" treatment).

<sup>25</sup>381 U.S. 479 (1965) (recognizing a right to marital privacy).

<sup>26</sup>United States v. Halliman, 923 F.2d 873 (D.C. Cir. 1991); United States v. Whoie, 925 F.2d 1481 (D.C. Cir. 1991); United States v. Shabazz, 933 F.2d 1929 (D.C. Cir. 1991); United States v.

faced a case<sup>27</sup> involving narcotics dealers who conducted their illegal trade out of several rooms in a hotel. He rejected the argument that a warrantless search of one of the rooms was unlawful. Judge Thomas held that, although "the police carefully investigated the suspicious hotel guests for more than a week and sought warrants for all the rooms that they could link to [defendant]," the defendant "tried to frustrate the warrant process by hopping from room to room."<sup>28</sup> Following recent Supreme Court precedent<sup>29</sup>, he further ruled that evidence seen by the police during an unlawful search was nonetheless admissible at trial because it was subsequently acquired on the basis of an independent source.

In another case<sup>30</sup>, a unanimous panel upheld the conviction of a defendant who said he merely gave a drug dealer a ride to the scene of a drug transaction. Judge Thomas applied the appropriate standards of appellate review and concluded that the jury reasonably could have found that Poston was a lookout, not an innocent chauffeur. Thus he could be found guilty of aiding and abetting possession with intent to sell.

Judge Thomas also correctly anticipated a recent Supreme Court ruling<sup>31</sup> by finding that sentences for certain drug offenses could be calculated according to the gross weight of the pills containing the illegal drug.<sup>32</sup>

Two cases provide an interesting contrast and illustrate the care with which Judge Thomas evaluates evidence and interprets statutes. In United States v. Harrison,<sup>33</sup> police arrested three men in a van with a substantial quantity of drugs. Two of the men carried guns. The third, defendant Butler, was seated next to some ammunition and wore a bullet-proof vest. All three were convicted

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Harrison, 931 F.2d 65 (D.C. Cir. 1991); United States v. Poston, 902 F.2d 90 (D.C. Cir. 1990); United States v. Long, 905 F.2d 1572 (D.C. Cir.), cert. denied, 111 S.Ct. 365 (1990); United States v. Rogers, 918 F.2d 207 (D.C. Cir. 1990).

<sup>27</sup>Halliman, *supra*.

<sup>28</sup>923 F.2d at 879-80.

<sup>29</sup>Murray v. United States, 487 U.S. 533 (1988).

<sup>30</sup>Poston, *supra*.

<sup>31</sup>Chapman v. United States, 111 S. Ct. 1919 (1991).

<sup>32</sup>Shabazz, *supra*.

<sup>33</sup>931 F.2d 65 (D.C. Cir. 1991).

of both a drug offense and using or carrying a firearm in committing a drug trafficking crime. Butler challenged his firearm conviction. A unanimous panel of the appeals court joined Judge Thomas' ruling that Butler constructively possessed the firearms.<sup>34</sup>

In United States v. Long,<sup>35</sup> Judge Thomas confirmed his concern for the rights of the defendant when he reversed a conviction under the same firearms statute. The defendant had been arrested in a co-defendant's apartment that "brimmed with evidence" of drug-related activity. Police found a functional but unloaded revolver between the cushions of a sofa. Judge Thomas ruled that the government had provided no evidence from which to infer that the defendant constructively or actually used the revolver:

Upholding the conviction of a defendant in the absence of any indicia of possession would stretch the meaning of 'use' beyond the breaking point. . . . To affirm Long's conviction for 'using' the revolver in the sofa would be to concede that the word 'use' has no discernible boundaries. That prospect is particularly troubling where, as here, we are construing a criminal statute.<sup>36</sup>

Taken together, these two cases illustrate the unbiased integrity with which Judge Thomas approaches criminal adjudication.

As a further indication that Judge Thomas does not reflexively rule for the government in criminal cases, I note that he joined an opinion by Judge Silberman overturning a conviction for wire fraud on the ground that the trial court had excluded admissible exculpatory evidence.<sup>37</sup> Judge Thomas also severely criticized government attorneys for attempting to block the defendant from raising an issue,<sup>38</sup> and expressed his "dismay" at learning that the government could not give the court certain information.<sup>39</sup> Rather than entirely dismiss an untimely appeal, he remanded it to the district court to consider an extension of time.<sup>40</sup>

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<sup>34</sup>"[T]he jury could reasonably have inferred that when and if Butler was shot at, he would either use one of his confederates' guns to shoot back, or else instruct them to do so." Id. at 73.

<sup>35</sup>905 F.2d 1572 (D.C. Cir. 1990).

<sup>36</sup>Id. at 1577.

<sup>37</sup>United States v. Miller, 904 F.2d 65 (D.C. Cir. 1990).

<sup>38</sup>Long, 905 F.2d at 1580-81 n.14.

<sup>39</sup>United States v. Halliman, 923 F.2d at 879 n.3.

<sup>40</sup>United States v. Long, supra.

Judge Thomas' opinions reveal a highly analytical and well-organized mind. They also confirm his commitment to judicial restraint, as he tended to resolve issues on appropriately narrow grounds, and continually confined his analysis to whether the language of the rule or statute under consideration could be given its normal and common-sense meaning. In my view, these qualities will serve him and the public well as a member of the United States Supreme Court. I would not expect him to reach out to consider issues that were not adequately raised or presented to the Court; nor would I expect him to resolve issues based on considerations unrelated to the text and history of the applicable law. He would not intrude upon those areas reserved to either the concomitant branches of the federal government or state governments. I strongly believe he would be fair to both prosecutor and defendant alike.

Judge Thomas' concern for the rights of the individual strongly commends him as someone who is especially suited to serve as a Justice of the Supreme Court. When we speak of judicial "temperament," what we are really talking about is a person's ability to decide cases objectively, according to the rule of law, without regard for his or her own personal preconceptions or preferences.

Law, as we commonly understand the term, can have little meaning if it is not based upon neutral, readily discernible principles. If law is not based upon neutral principles, it ceases to be law but rather becomes an invitation for legislation by the judiciary. Therefore, the cornerstone of any assessment of judicial temperament must be an evaluation of the nominee's commitment to the rule of law. Not law as the judge would wish it to be, or thinks it ought to be, but the law as expressed by those who wrote the words and consistent with what they intended those words to mean.

As Judge Thomas has written, "the founders purposely insulated the courts from popular pressures, on the assumption that they should not make policy decisions. . . . [I]t was unthinkable that courts would take the side of particular groups in the policymaking arena."<sup>4</sup> There is nothing in Judge Thomas' record that suggests he would suddenly abandon his careful judicial approach in favor of expediency. Rather, there is every indication that he will consider each case before him on its own merits, and give appropriate deference to precedent.

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<sup>4</sup>"Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years, ch. 28 (1988).

CONCLUSION

I urge the Committee to recommend that the Senate confirm Clarence Thomas as Associate Justice of the United States Supreme Court.

Senator KOHL. Thank you, Ms. Norton.

Mr. Thompson, I hope you will respect the 5-minute limitation.

#### STATEMENT OF LARRY THOMPSON

Mr. THOMPSON. Thank you, Mr. Chairman and members of the committee.

I am pleased to appear before you today in support of the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

I practiced law with Judge Thomas some 14 years ago in Monsanto Co., in St. Louis, MO. I knew Judge Thomas then as a bright young lawyer who was highly respected by his peers and superiors in a demanding corporate law environment. I know Judge Thomas today as a legal scholar, with valuable hands-on experience in the public policy arena. He now serves as a distinguished lecturer at the Emory University Law School in Atlanta.

Now, while Judge Thomas could have become quite comfortable financially by entering the private practice of law or continuing in a corporate law department, he chose not to do so. His entire career since leaving St. Louis to work with Senator Danforth, your colleague, has been dedicated to public service. As Chairman of the Equal Employment Opportunity Commission, he led the agency in removing a backlog of discrimination cases that served unfairly to deny relief to individuals who suffered employment discrimination.

Now, I have talked with several career EEOC professionals in Atlanta and from other parts of the country. These individuals praise and respect Judge Thomas for the job he did at the EEOC. They will tell you that the EEOC is in much better shape now, because of Judge Thomas, than it was when Judge Thomas took over.

One such person in Atlanta told me this past weekend that if Judge Thomas' critics do not want to change their views of him, then they should avoid getting to know him, and I agree. While some may disagree with Judge Thomas' views on several issues, I do not believe that many who may differ with him on these issues, but who have had an opportunity to know him will oppose his nomination to the United States Supreme Court.

Now, while Judge Thomas sharpened the focus of the EEOC in protecting individual victims of employment discrimination, he did not arbitrarily ignore larger class cases. In fact, the former General Counsel of the EEOC has noted that Judge Thomas himself initiated a race discrimination class complaint against a large foreign-based automobile manufacturer, which eventually led to a multi-million-dollar settlement.

As a black American, I am somewhat puzzled by the opposition to Judge Thomas' nomination from some of the organizations dedicated to the interest of black Americans. As a former U.S. Attorney in Atlanta, I believe that Judge Thomas' values and views on a number of subjects, including education, the need for self-esteem and a strong work ethic and the influence of a stable family and the church are not out of step with those of most black Americans who are, in fact, hard-working and law-abiding people.

Much of the good-faith and nonpartisan opposition to Judge Thomas from some of these organizations appears to center on his views on affirmative action. But Judge Thomas has stated that,

with the exception of quotas, he supports many affirmative action remedies, because these remedies are truly necessary and fair.

Both Judge Thomas and I have seen the pernicious effects of quotas. We both know many outstanding, highly trained and capable black American professionals and business people who are frustrated, because they are viewed only as members of a group who got their positions through quotas, rather than because of their qualifications as individuals. Their true achievements are being devalued and obscured.

Like the leaders of the organizations who oppose him, Judge Thomas understands that, unfortunately, many black Americans still suffer race discrimination and other forms of basic unfairness, but he differs with these leaders only as to how to attack the problems that face black Americans. But this difference, I submit, should not affect this body's decision as to whether to confirm Judge Thomas' nomination to the U.S. Supreme Court.

Black Americans need not and should not all think alike, and this diversity of opinion within the black community on how black Americans should advance is deeply rooted in our history and has served black Americans and this Nation well over the years.

Any distinguished American lawyer, with solid public policy experience, especially one like Judge Thomas, with his background, his intellect, his character, and his integrity, is needed not only on the United States Supreme Court, but inside the Court in its deliberations on a variety of issues, and not just on affirmative action.

For these reasons, I respectfully urge you to confirm the nomination of Judge Thomas to the United States Supreme Court.

Thank you.

Senator KOHL. Thank you very much, Mr. Thompson.

Mr. Kern.

### STATEMENT OF JOHN W. KERN III

Mr. KERN. Mr. Chairman, I am pleased to be here this morning to testify on behalf of myself and not the Judiciary Leadership Development Council, which I serve as President. I am here to attest to Judge Thomas' combination of open-mindedness and an inner strength and a compassion which I have found in working with him in connection with the continuing judicial education efforts of the Judiciary Leadership Development Council.

President Lyndon Johnson appointed me to the District of Columbia Court of Appeals in 1968. In 1984, I took senior status and became the Dean of the National Judicial College, in Reno, NV, and I know a number of Wisconsin judges who came to our college in seeking continual judicial education. I came to have a great interest in the concept of judges continuing to keep open minds and express a willingness to learn new ideas and to pursue continuing judicial education.

I returned to Washington, DC, and I perform judicial services part-time for my court, but I also direct the Judiciary Leadership Development Council in providing continuing education of judges.

Judge Thomas is one of a number of judges, judicial educators, and State court administrators that are on our advisory committee. I have had a number of conversations with him and I have been

very impressed with his open-mindedness, his interest in maintaining readings, discussions, involving himself in the life of the mind, which I think is extremely important, based upon my experience with judges in judicial education.

I have also been struck by his combination of strength and determination that have caused him to rise above the serious obstacles that he faced in his early life and with his sensitivity and his compassion. I have had a number of conversations of an informal nature about life, about education of children, the kinds of things that judges frequently talk about in the cafeteria across the street from the courthouse over coffee and a roll, and I have found him always to be a person of keen intellect, very good humored, very approachable and very open-minded.

In many ways, he reminds me of my own father, who was a State trial judge in Indiana and then a Federal trial judge for almost 35 years. My father was stricken with polio very early in his life, and I found that rising above that early disaffection that occurred to him, he had unusual strength and determination, but he also had unusual sensitivity and compassion. I see that in Judge Thomas and I heartily recommend him for your approval.

Thank you.

Senator KOHL. Thank you very much, Mr. Kern.

Ms. Bracher.

#### STATEMENT OF BARBARA K. BRACHER

Ms. BRACHER. I am honored to speak before the committee on behalf of the confirmation of Judge Clarence Thomas. The report I submitted on Judge Thomas' criminal law and procedure opinions to this committee last week includes a comprehensive review of Judge Thomas' judicial opinions while serving on the D.C. Circuit Court of Appeals. This report was distributed last week to members of this committee, but I would like to request that it be submitted to the record of these hearings.

I want to highlight three major points from the report that I hope will be helpful to this committee in assessing Judge Thomas' judicial philosophy: first, Judge Thomas has demonstrated his strict adherence to the rule of law; second, his observance of controlling precedent and accepted principles of statutory construction; and, third, his faithfulness to prudential limitations on the scope and standard of review of the Court.

I have chosen these three principles because they are premised on the first ideals from the Preamble of our Constitution: to establish justice and ensure domestic tranquility. Judge Thomas' opinions reflect a true understanding of these words.

It is in this context that Judge Thomas faithfully construed the law to preserve the rights of individuals and the rights of society to be safe in their own homes. Judge Thomas interpreted many statutes in his opinions: the Federal Sentencing Guidelines, Rules of Evidence, Rules of Appellate Procedure, Criminal Procedure, among others.

When construing statutes, Judge Thomas utilizes accepted principles of statutory construction as established by Supreme Court precedent to first look to the actual text and the specific terms of

the statute. He has refused to read statutes in a textually awkward manner, interpreting the statutes to rely upon inferences and loose transitive implications.

Judge Thomas reviewed lower court and circuit court precedent to identify prior standards and assure consistency in the criminal laws. Judge Thomas observed the rule of the Court of Appeals in its limited scope of review while mindful of the standard of review imposed upon the particular appeal before the Court.

Judge Thomas has refused to go beyond the issues presented to the Court or to decide issues not brought before the Court of Appeals.

Judge Thomas has a scrupulous regard for the rights of the accused, mindful of the sufficiency of the evidence presented by the Government. In overturning a firearms conviction in the case *Long v. U.S.*, Judge Thomas found that the Government had failed to meet its burden to properly satisfy the elements of the alleged crime.

I want to conclude by saying that it is crucial to look at Judge Thomas' writings since becoming a member of the judicial branch. The review of what Judge Thomas has actually written as a member of the judicial branch reveals that Judge Thomas is a thoughtful jurist with a keen intellect. He interprets statutes as Congress has written and follows controlling precedent, mindful of the role of the Court in its review and the cases before it.

Judge Thomas' criminal law opinions evidence his judicial restraint, his commitment to established rules of law, utilizing traditional tools of statutory construction and thoughtful attention to decide only the issues required in a particular case. These writings affirm that he will be an outstanding addition to the Supreme Court, one who will judge according to the law rather than to his own personal predilections.

Judge Thomas' nomination should receive confirmation by the Senate to serve on the Supreme Court.

[The report prepared by Ms. Bracher follows:]

**CITIZENS FOR LAW AND ORDER**

**REPORT ON THE JUDICIAL PHILOSOPHY OF  
JUDGE CLARENCE THOMAS WITH RESPECT TO  
CRIMINAL LAW AND CRIMINAL PROCEDURE**

**BY  
BARBARA K. BRACHER**

**Judge Clarence Thomas's Criminal  
Law and Procedure Opinions**

Citizens for Law and Order ("CLO") commissioned this study of Judge Clarence Thomas's judicial philosophy as it relates to criminal law and procedure. A careful review of the legal opinions authored by Judge Thomas while a member of the United States Court of Appeals for the District of Columbia Circuit reflects a thoughtful jurist with a restrained judicial temperament and keen intellect. Judge Thomas has demonstrated strict adherence to the rule of law, even where his personal beliefs differ from a legal rule. His opinions and other writings demonstrate a fundamental understanding of the community's interest in deterring crime and meeting the needs of its victims. While Judge Thomas's opinions reflect an understanding that a judge is responsible for protecting the rights of those accused of crime, he also understands that a judge has a duty not to reshape the law according to his personal predilections.

Judge Thomas has participated in over 157 cases since joining the D.C. Circuit Court of Appeals. He has authored 17 majority opinions, 2 concurrences, and 2 dissents. Of those seventeen opinions, seven

were appeals from drug convictions. The criminal law opinions of Judge Thomas were reviewed with reference to his approach to controlling precedent, adherence to jurisprudential limitations on the power of the court, compliance with accepted principles of statutory construction, observance of settled rules concerning the standard of review, and faithfulness to prudential limitations on the scope of review and judicial decision-making.

Underlying Judge Thomas's approach to his obligation to decide criminal law cases is a common-sense approach to questions of criminal law and procedure, one that recognizes the practical problems faced by law enforcement officers combatting crime on the streets. When asked what should be done to solve the problems faced by America's inner cities, Judge Thomas remarked:

The first priority is to control the crime. The sections where the poorest people live aren't really liveable. If people can't go to school, or rear their families, or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are the criminals?

Black America Under the Reagan Administration: A Symposium of Black Conservatives, The Heritage Foundation Policy Review (Fall 1985) at 37.

None of the speeches or statements made by Judge Thomas, however, explains how he will rule as a justice of the United States Supreme Court as clearly as his actual majority opinions. To borrow the words of L. Gordon Crovitz of the Wall Street Journal, "the best way to predict how Justice Clarence Thomas would rule is to review how Judge Clarence Thomas has ruled." Thus, a review of Judge Thomas's criminal law decisions follows.

United States v. Shabazz  
United States v. McNeil  
1991 U.S. App. LEXIS 10579 (May 28, 1991)

In the district court, the two defendants pleaded guilty to drug offenses involving dilaudid pills, the active ingredient of which is hydromorphone, a controlled substance. On appeal, the two defendants

alleged that the district court erred when it calculated their sentences under the Federal Sentencing Guidelines according to the gross weight of the dilaudid pills rather than the lesser net weight of the hydromorphone.

Judge Thomas's opinion for a unanimous panel of the Court of Appeals begins with an analysis of the applicable Sentencing Guidelines. Judge Thomas found that the Sentencing Guidelines require sentences to be calculated according to "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." *Id* at \*4 (citing to United States Sentencing Commission, Guidelines Manual § 2D1.1(c)n.\* (Nov. 1990)). Relying on analogous decisions from the other circuits, Judge Thomas found defendants' claim that the pills were not a "mixture or substance" to be without support.

In an alternative argument, the defendants urged that an interpretive note to the Sentencing Guidelines supported the position that sentencing should be based on the weight of the controlled substance when the weight of the substance with which it was combined is

unknown. Judge Thomas explained that the "interpretive notes" served to illustrate how the guidelines were to be applied but were not intended to be a substitute for the clear text of the Guidelines. Judge Thomas determined that, "by its terms," defendant's reading was "textually awkward and produces absurd results" and that "nothing in the text ... suggest[s] that limitation." *Id.* at \*10.

Judge Thomas rejected defendants' final claim that the method of sentencing articulated in the Sentencing Guidelines conflicted with a federal statute that requires sentencing based upon the gross weight of certain specified drugs. That statute did not refer to hydromorphine. Recognizing that the Sentencing Guidelines were promulgated "by the United States Sentencing Commission pursuant to an express grant of rulemaking authority," Judge Thomas held that the court may set aside the Guidelines "only if it contravenes an 'unambiguously expressed intent of Congress' or is unreasonable." *Id.* at \*15 (citing to Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984)). Judge Thomas relied on recent authority from the D.C. Circuit

in which the court had refused to accept "an argument that the negative implication of one provision unambiguously restricted a grant of authority that could otherwise be read into another provision." *Id.* at \*18. Judge Thomas concluded that the court was "aware of no 'traditional tools of statutory construction,' that would compel [defendant's] proposed reading." *Id.* at \*19 (citations omitted).

Two days after Judge Thomas issued the opinion in this case, the United States Supreme Court decided Chapman v. United States, 111 S. Ct. 1919 (1991). In Chapman, the Supreme Court reached the same conclusion based on the same rationale articulated by Judge Thomas in Shabazz. The Supreme Court held that a statute requiring the imposition of a mandatory minimum sentence for distribution of more than one gram of "a mixture or substance containing a detectable amount" should be determined by the weight of the mixture rather than the net weight of the controlled substance. *Id.* at 1925.

United States v. Harrison  
United States v. Black  
United States v. Butler  
931 F.2d 65 (D.C. Cir. 1991)

Writing for a unanimous court, Judge Thomas affirmed the convictions of three defendants for possession with intent to distribute crack cocaine base and using or carrying a firearm during a drug trafficking offense. The three men were searched and subsequently arrested after police stopped a van in which they were traveling that carried a temporary license tag identified by the police as stolen. Harrison was carrying an unregistered handgun in a holster clipped to his belt and \$595 in cash. Black had 4.5 grams of cocaine base in his pants pocket and was also carrying an unregistered handgun. Butler was wearing a bullet-proof vest under his clothing. Other incriminating evidence found in the van included: 42 grams of diluted cocaine base, a temporary license tag with a different number than the one displayed on the outside of the van, a weapons magazine that contained pictures of the guns carried by defendants, and two fully loaded ammunition clips. Harrison sought to call Black to the stand.

At trial, Black refused to testify, invoking his Fifth Amendment privilege against self-incrimination. Harrison and Butler each moved unsuccessfully to sever their trials from Black's in order to obtain his testimony. Harrison appealed from the district court's refusal to sever his trial from that of his co-defendants. Black claimed that the act of calling him as a witness violated his Fifth Amendment privilege against self incrimination and Butler challenged the sufficiency of the evidence underlying his firearms conviction.

Judge Thomas examined the Federal Rules of Criminal Procedure governing severance of trials. The language of the rules allows the district court judge to determine whether to sever trials based upon a determination that a joinder of offenses or defendants would prejudice the defendant or the government. Supreme Court as well as D.C. Circuit Court precedent favors joinder of trials unless it is determined that the defendant "did not get a fair trial." The D.C. Circuit set forth its general standard in United States v. Ford, 870 F.2d 729, 731 (D.C. Cir. 1989), requiring that the defendant seeking a severance show: (1) a bona fide

need for the testimony; (2) the substance of the testimony and its exculpatory nature and effect; and (3) the likelihood that the defendant will testify if the cases are severed. Failure to demonstrate any one of these elements was fatal to severance. Id. at 732.

After an extensive review of the trial record, Judge Thomas concluded that Harrison had not identified Black's allegedly exculpatory testimony with sufficient specificity to establish that the district court's failure to sever deprived Harrison of a fair trial. In response to Harrison's argument that the court should be guided by analogous decisions from three other circuits, Judge Thomas distinguished those decisions based on controlling precedent of the D.C. Circuit.

Judge Thomas rejected Black's claim that his Fifth Amendment rights were violated when Harrison announced that he intended to call Black as a witness, reasoning that any error that may have occurred was not sufficiently prejudicial in light of the strong case against him to permit reversal under the "plain error" rule of criminal procedure applicable to

claims not properly preserved below.

Finally, Judge Thomas held that there was sufficient evidence to permit a rational jury to find Butler guilty of the firearms offense on a "constructive possession" theory. Judge Thomas cited D.C. Circuit precedent for the proposition that a person is in "constructive possession" of a firearm if it is "within easy reach and available to protect [the user] during his ongoing [drug trafficking] offense." After a thorough review of recent circuit decisions on constructive possession, Judge Thomas determined that the jury reasonably could have inferred (by Butler's presence in a van containing two guns, while wearing a bulletproof vest) that Butler constructively possessed either or both of the guns.

United States v. Whole  
925 F.2d 1481 (D.C. Cir. 1991)

A jury convicted the defendant of distributing crack cocaine and of using the telephone to facilitate his drug transactions. At trial, the

defendant claimed entrapment. The jury rejected that defense and convicted him on all nine counts. On appeal, Whoie argued for the first time that the district judge had erroneously instructed the jury on the elements of the entrapment defense. Judge Thomas examined the contention in light of the two elements of entrapment established by the Supreme Court: the government must have induced a defendant to commit a crime and it must be a crime that the defendant was not otherwise willing to commit. Whoie claimed that the district judge improperly allowed the jury to decide whether he had produced sufficient evidence of government inducement. Judge Thomas concluded that there was sufficient evidence of inducement to submit that issue to the jury.

Whoie also contended that the trial court failed to amend the model jury instructions to make explicit the government's burden to prove beyond a reasonable doubt that defendant was predisposed to commit the crimes. Judge Thomas relied on established D.C. Circuit precedent requiring that the court must "always consider the whole instruction -- not just the supposedly erroneous snippet.... In deciding whether jury

instructions are plainly erroneous, [the court will] consider as well the lawyers' arguments and the evidence." As a result, Judge Thomas concluded that the district judge's numerous explanations to the jury at trial of the defendant's presumed innocence properly evidenced that the government carried the burden of proof to show the defendant was "ready and willing" to commit the crime. Thus, the district court judge's use of the model jury instructions was not plain error.

**United States v. Halliman**  
923 F.2d 873 (D.C. Cir. 1991)

Defendants were convicted of possession with the intent to distribute cocaine and crack cocaine base. The trial court rejected defendants motion to suppress evidence the police had obtained through searches.

After receiving a call from the manager of a hotel, the police conducted an investigation of a group of guests suspected of dealing

drugs. The police obtained search warrants to search the three rooms where the guests were staying. As they were leaving the station with the warrants, the police learned that one suspect had moved to another room. Rather than delay their search, the police decided to execute their warrants and attempt to interview the suspect in the newly rented room. When they knocked on the door of the newly rented room, a person inside asked them to wait "just a minute." The officers down the hall began to execute their searches on the other three rooms. Upon hearing a toilet flush inside the newly rented room and fearing that the person inside was destroying the evidence, the police officers forcibly entered the room. They found a bag of cocaine lying on the floor of the bathroom in plain view. They also executed a search that uncovered more cocaine in the room. The police subsequently obtained an emergency search warrant for this room and found certain drug paraphernalia. During the period of the initial search, the police executed a pat-down search of two other defendants as they returned to their hotel rooms. They discovered seventeen bags of crack cocaine and keys to the hotel rooms.

Judge Thomas, writing for a unanimous panel, affirmed the district court's denial of defendants' motion to suppress the evidence found during these searches. The court ruled that the warrantless search was justified by "exigent circumstances" doctrine. Judge Thomas relied on settled D.C. Circuit standards concerning exigent circumstances and found sufficient evidence in the trial record to satisfy that standard.

In Murray v. United States, 108 S. Ct. 2529 (1988), the Supreme Court had held that "evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source" is admissible at trial. Judge Thomas concluded that the emergency search warrant satisfied the requirement of an "independent source" and upheld the admission of the evidence.

The court also found that the police had probable cause to search the two men entering the hotel. The men had been under observation for over a week and when they entered the hotel and went to the rooms where the drugs were stored, the "totality of the

circumstances" provided probable cause to arrest the two defendants. The court also found that the district court did not abuse its discretion in denying the defendant's motion to sever the trials based upon the government's introduction of "independent and substantial evidence" in support of the defendant's individual charges.

United States v. Rogers  
918 F.2d 207 (D.C. Cir. 1990)

The defendant was convicted of possessing more than 50 grams of crack cocaine with the intent to distribute within 1,000 feet of a school.

Police officers observed a group of men gathered on a street known to be frequented by drug dealers. Upon seeing the officers, the defendant grabbed a gym bag and ran. When the police pursued him, the defendant threw the gym bag into a sewer. The defendant was arrested and when searched, police found a telephone beeper. When the officers

retrieved the gym bag, it contained fifty-five grams of 82% pure crack cocaine.

Defendant took the stand and testified that he had been on his way to visit a girlfriend who lived on the street. The defendant further testified that the gym bag was not his bag but belonged to a friend. The district court then allowed the prosecution to question the defendant about his prior arrests as a juvenile -- that he had once before distributed crack cocaine on the same street and thrown the crack away in the same manner when he had seen the police. The district court also allowed testimony that he had once owned a beeper.

The jury convicted the defendant and he appealed. Judge Thomas, writing for a unanimous panel, rejected defendant's argument that the Federal Rules of Evidence prohibited admission of his prior conduct. He stated that the "Federal Rules of Evidence are creatures of statute" and thus should be interpreted by beginning with the language of the rules themselves using "'traditional tools'" of statutory

construction. After a review of the language, supported by Advisory Committee notes and decisions from other circuits, Judge Thomas upheld admission of the evidence. The testimony was not offered to prove character and the district court did not abuse its discretion in allowing the evidence.

Finally, Judge Thomas rejected defendant's argument that the district court should have granted his motion for acquittal or a new trial. Based upon Supreme Court standards, Judge Thomas found that "[a]mple and convincing evidence supported the jury's verdict under the reading of the statute even more favorable to [defendant]." *Id.* at 214.

United States v. Long  
United States v. Mayfield  
905 F.2d 1572 (D.C. Cir.),  
cert. denied, 111 S. Ct. 365 (1990)

Two defendants were convicted of possession of cocaine with intent to distribute and of using a firearm in a drug trafficking crime. The

defendants were arrested in an apartment where cocaine and other drug paraphernalia was found. The police also found an unloaded handgun between the sofa cushions.

One of the defendants filed her notice of appeal one day later than the Federal Rules of Appellate Procedure permits. Judge Thomas rejected the appeal stressing that the time limit is "mandatory and jurisdictional," citing the Supreme Court's decision in United States v. Robinson, 361 U.S. 220 (1960). The court rejected defendant's argument that the court's docketing of her untimely notice of appeal should have been construed as an implicit extension of time. Judge Thomas declined to equate the ministerial act of docketing an appeal with an implicit grant of an extension of time finding that "the unambiguous language of the rule forecloses this shortcut." 905 F.2d at 1574. Although Judge Thomas's interpretation was required by precedent of the D.C. Circuit, he also distinguished other circuit decisions that allowed untimely appeals. He emphasized that the specified time limits "serve vital interests of efficiency and finality in the administration of justice."

Id. at 1575. The court remanded the case for a determination whether the defendant should be granted a discretionary thirty day extension permitted in the rules based upon a showing of excusable neglect.

As to the other defendant, the court (with Judge Sentelle concurring separately) reversed the firearm conviction and affirmed the drug conviction. Noting that the appellate court owes "tremendous deference to a jury verdict" in the face of a challenge to the sufficiency of the evidence, Judge Thomas nonetheless, found that the government failed to produce any evidence that the defendant had "use[d] or carrie[d] a firearm" within the meaning of the statute. Judge Thomas rejected the government's argument that the defendant "used" the gun by committing a drug offense facilitated by a gun. He stated that such an interpretation would obliterate any remaining limits on the meaning and application of the word "use," a prospect particularly troubling when construing a criminal statute. Judge Thomas rejected "the notion that a loose, transitive relationship of this type is sufficient to show that a person 'used' a gun." Based upon a comprehensive review of D.C. as well as

other circuit court precedents, Judge Thomas explained that the government must establish some nexus whereby the defendant actually or constructively possessed the particular firearm in order to prove that he "used" it.

The narcotics charges were affirmed despite defendant's objections that evidence of a telephone call received by the police officer at the defendant's house should not be admissible. The statements made by the caller were not excluded as hearsay since they were not offered as assertions that the defendant was involved in drug dealing. Instead, the evidence was received as a series of nonassertive questions falling outside the scope of the hearsay rule.

Judge Thomas upheld the district court's denial of defendant's motion to sever his trial finding that the evidence against the defendants failed to rise to the "gross disparity of evidence" standard as dictated by the Supreme Court. Noting that there is a "strong and legitimate interest in efficient and expeditious proceedings," Judge Thomas added that "this

interest must never be allowed to eclipse a defendant's right to a fair trial." In holding that the district court did not abuse its discretion in denying the motion to sever, Judge Thomas found that an abundance of evidence implicating both defendants was presented to the court.

**United States v. Poston**  
**902 F.2d 90 (D.C. Cir. 1990)**

Knowing that his friend was carrying PCP and intended to distribute it, the defendant drove him to the site of the drug sale. The defendant dropped off his friend and drove around the block to the next corner while the sale was being consummated. He was arrested while waiting in his truck. The jury found the defendant guilty of aiding and abetting the possession of PCP with intent to distribute but acquitted him of the charge of aiding and abetting the distribution. On appeal, the defendant argued that (1) there was insufficient evidence to convict; (2) the district court abused its discretion in denying his motion for a continuance on the day before trial; (3) he was denied effective

assistance of counsel because the lawyer he hired only had one day before trial to prepare; and (4) he was denied due process when the prosecution refused to request a downward departure from the federal Sentencing Guidelines.

Writing for a unanimous panel, Judge Thomas affirmed defendant's conviction. On the aiding and abetting charge, Judge Thomas was guided by the limited review the Supreme Court permits for assessing the sufficiency of evidence on appeal. Judge Thomas declined to construe the statute to require that the defendant must himself have actually possessed the illegal drug or assisted in obtaining possession of it. This "cramped" interpretation of the statute was rejected because of the court's well-established, broad standards that require only that the defendant have aided and abetted in the crime of possession of the drug.

The court also rejected the defendant's contention that it was an abuse of discretion to deny his motion for continuance on ground that it was the defendant's delay in deciding to select new counsel that

prompted the motion for continuance at the "eleventh hour." Judge Thomas noted the public's "strong interest in the prompt, effective, and efficient administration of justice," emphasizing defendant's lack of evidence to demonstrate that the trial judge abused his discretion to deny the continuance.

Defendant's claim that he received ineffective assistance of counsel was found to be without merit and unsupported by Supreme Court precedent. Defendant failed to point to any error made by his counsel or to show that it resulted in any prejudice to his defense. His ineffective assistance of counsel defense was therefore inadequate as a matter of law.

Finally, defendant argued that he was denied due process by the failure of the prosecution to request that his sentence be reduced below the statutory minimum mandated under the Sentencing Guidelines. This allegation arose from statements made by the arresting officers concerning the defendant's cooperation. Since the police did make this

cooperation known, Judge Thomas held that the commitment to the defendant to do so could not be construed to obligate the prosecution to file a motion to depart from the sentencing guidelines.

### Conclusion

Judge Thomas's criminal law opinions evidence his belief in judicial restraint, his commitment to established rules of law and thoughtful attention to the issues before the court in a particular case. His opinions show scholarship and keen attention to detail with a scrupulous regard for the rights of defendants and a concurrent concern for victims. As shown by this analysis, Judge Thomas's observance of controlling precedent, particularly in cases such as Whoie, Poston and Harrison, provided the consistency and predictability we demand of criminal laws. In Long and Halliman, Judge Thomas refused to expand the jurisdiction of the court or to answer questions not properly before the court. Judge Thomas's observance of "traditional tools" of statutory construction in cases such as Rogers and Long, compelled the court to construe the applicable statutes as intended by the legislature rather than

in accordance with the judge's own predilections. Finally, in Rogers, Long, and Halliman for example, Judge Thomas rejected arguments that evidence must be excluded when there is a justifiable basis for admission. This study of Judge Thomas's criminal law and procedure majority opinions highlights his proven judicial qualifications and suggests that he would be an extremely able and valued member of the Supreme Court.

Senator KOHL. Thank you very much, Ms. Bracher.  
Ms. Holmes.

### STATEMENT OF SADAKO HOLMES

Ms. HOLMES. Mr. Chairman, members of the committee, I wish to thank you for the opportunity to speak in support of President George Bush's nominee, Judge Clarence Thomas, to the U.S. Supreme Court. I have been asked by the National Black Nurses Association's Executive Committee to appear on their behalf for the purpose of reading into the record a letter sent by the board to our president. The president of my organization, Dr. Linda Bolton, would have appeared before you, but her schedule does not permit her attendance.

Highlights from the letter sent to the President is as follows:

August 16, 1991. Dear Mr. President: The Board of Directors of the 7,000-member National Black Nurses Association, Inc., has voted to support your nomination of Judge Clarence Thomas to be the newest Associate Justice to the United States Supreme Court.

The National Black Nurses Association reaches 130,000 black nurses in the United States, the Eastern Caribbean, and Africa. We have known Judge Thomas since 1985 when he spoke to the National Black Nurses Association's membership. We were impressed then by his vision. We continue to admire his strength. He is a committed public servant and a respected jurist. We admire his personal development from a child who lived in segregated rural Georgia to nomination to the highest Court in the United States. The uniqueness of his background promises to provide an important voice on the Court.

Justice Thurgood Marshall has been a lifelong champion for the creation of equal rights. We expect that Judge Thomas will continue this commitment. We believe that Judge Thomas at this point in his life is prepared to accept this challenge. Sincerely, C. Alicia Georges, President for the Board of Directors of the National Black Nurses Association.

Senators, as a private citizen, I would also like to express my support for Judge Clarence Thomas. I have known Judge Thomas for over 20 years, and it has been a privilege for me to witness the development and growth of Judge Thomas whom I have observed for so many years, starting from his college days to his nomination to be a member of the U.S. Supreme Court.

Shortly after Judge Thomas was confirmed as a judge and sworn in, I visited him in his office. On that day, he shared with me the now famous letter from the young man in Georgia who saw Judge Thomas as his role model. Judge Thomas was clearly moved by this youth's struggle to overcome obstacles similar to his own, and he enthusiastically responded to the young man's letter.

In August 1985, Judge Thomas presented a speech at the National Black Nurses Association's 13th National Institute and Conference. The speech, which was later published in the association's journal, was about a troubled black community, particularly the educational plight of black children.

Clarence Thomas is a role model for many of us of all ages. He is a man of impeccable integrity whose successes in life have been achieved against all odds. As an African-American, I am particularly proud of his accomplishments.

For many of us, especially those who I know in the nursing profession, the presence of Judge Clarence Thomas on the Supreme Court of the United States will be an assurance that someone with

a special hard-earned sensitivity is there, providing a special dimension to America's highest tribunal.

Lastly, as a nurse, I am particularly aware of the importance of sensitivity and compassion. The people of our country face many problems where a special understanding and patience makes an enormous difference in whether or not we successfully meet our challenges. I know that Judge Thomas will bring that special sensitivity and compassion to the Supreme Court, and all of us will benefit from his service on the Supreme Court.

Thank you.

Senator KOHL. Thank you very much, Ms. Holmes.

Justice Black once observed, and I quote, "Under our constitutional system, courts stand against any old winds that blow as havens of refuge for those who might otherwise suffer because they are helpless or weak or outnumbered, or because they are non-conforming victims of prejudice and public excitement."

My question is: Was Justice Black right when he argued that this is an important role of the courts? Or was that just rhetoric?

Mr. KERN. Right; not rhetoric.

Senator KOHL. He is right. Anybody disagree with that? The very important role of the courts. Ms. Norton.

Ms. NORTON. The role of the courts is that of something beyond the electoral branches where each person goes into court on an equal footing. And through that function, it allows people to have a voice that they might not otherwise have.

Senator KOHL. I would like to ask you all, in light of that, why you think Judge Thomas will measure up in this respect. Is it because of his work as a policymaker, his work on the courts for the past 16 months? What is it about Judge Thomas substantively—what can you point to in his background and his work history that leads you to believe that he will live up to this part of his responsibility as a Supreme Court Justice?

Mr. THOMPSON. Senator, if I may respond to your question?

Senator KOHL. Yes, Mr. Thompson.

Mr. THOMPSON. My response will be based somewhat on my knowledge of Judge Thomas as a lawyer and as a friend, and that is that in every position that he has held—in the private sector, as the head of a large public agency for which he had to have public policy considerations, and on to the District of Columbia Court of Appeals—he has taken every position seriously. He has attempted to and has discharged the duties of those positions faithfully, and I see nothing in his background that would lead me to believe that he would do anything less on the U.S. Supreme Court.

Senator KOHL. Any other comment on that, Ms. Bracher?

Ms. BRACHER. I would just like to comment. My comments come from a review of his criminal law opinions, and I take comfort that all of Judge Thomas' opinions are firmly grounded in law. He does not rule on policy considerations. When you review his opinions, you will see that he construes the statutes as written. He is very mindful of the precedent of the court, very mindful that, especially in criminal law decisions, there needs to be a firm ground from which people can work.

Senator KOHL. That isn't what I—I was referring to what Justice Black had said, that the courts stand as a haven for those people

who might otherwise suffer as a result of majority views or momentary public hysteria—that the court has an emotional and sympathetic kind of a role to play. You didn't answer that. Maybe I didn't make myself clear.

Ms. BRACHER. I would say that the court is a haven for people when they have a judge who is going to rule on the law, when they have laws that they can determine what is required, when they have laws that are not ruled upon a judge's personal views or policy matters. That is a haven for people to know that a judge is going to fairly give them their day in court, is going to follow the law as it is written.

Ms. NORTON. In looking at his criminal decisions, it is clear he did not just reflexively rule in favor of the Government and, in fact, criticized Government activities or arguments that they had made in a few instances because he felt that they were not giving appropriate deference to the rights of the defendant.

Mr. KERN. I would answer your question this way, Senator: You don't live to be more than 60, as I have, without developing a certain feel for a person based on conversations and working together. And my feel based upon my knowledge of Clarence Thomas is that I would be willing to trust my life and liberty and property to decisions that he makes. And I am convinced on the basis of my conversations with him and dealings with him that he has an extraordinary compassion and extraordinary sensitivity, and he would be the right person to be on a court in the sense of being very sensitive to those in the minority by one reason or another.

Ms. HOLMES. Senator, as I spoke in my testimony, we feel that Judge Thomas does have a compassion and sensitivity, and he has shown that throughout the years. And he is going to bring to the Court not only the sensitivity and the compassion, but I have found him to be a very just and fair person. And I, too, would put my life in the hands of the Supreme Court with he being on the Supreme Court.

Senator KOHL. How do you all square some of the things you have said with his position as stated here numerous times as he testified before us, which was that when he was a policymaker—the things that he was and did, the expressions of his views, the opinions he held, the kinds of compassions that he expressed before he became a judge were things that he was trying to put behind him, because being a judge was an entirely different kind of profession, requiring different disciplines? He, in fact, asked us not to regard the things that he spoke of as necessarily descriptive of how he felt at this time, having become a judge and wanting to go on to the Supreme Court.

How do you square that, particularly with what you said, Mr. Thompson? You said you have known him and seen him in different positions throughout his career, and you could predict, based on all of these things you have seen in his career, what kind of a Supreme Court Justice he is going to be. He said disregard that.

Mr. THOMPSON. I would respond to your question this way. I think Judge Thomas' performance as the head of the Equal Employment Opportunity Commission—which is a political appointment, we all know—showed that he still—he has integrity. He is not a shill for anyone. He didn't even, in that position, which was a

political appointment, he did not have any hidden agenda; he tried to carry out the duties of that job consistent with the mandate of that agency. And when in fact he had personal and professional disagreements with the administration that appointed him, he voiced those disagreements. He was critical of the Reagan administration's stand with respect to Bob Jones University. This is a man with integrity. This is a man who takes his job seriously, and he has done so at every job he has had, and he is certainly going to do so as a justice on the United States Supreme Court.

Senator KOHL. All right.

Ms. BRACHER. I just want to say I think that—I don't want to put words into Judge Thomas' mouth—but I think one's views as an advocate or as an educator or as a policymaker are very different from when one puts on the robes and joins the judicial branch. And I think Judge Thomas was trying to explain his recognition of the way you approach the law when you are judging the law as opposed to being an advocate or as opposed to being an educator or a policymaker within the executive branch.

Mr. KERN. I would just add that Judge Thomas has been on the bench for more than one year. Every opinion that he has made has been reduced to writing and published. In effect he has put his way of thinking and his views on the record day in and day out in the work as an appellate judge. And I have read some of those opinions, and I think they reflect a measured view, a fair statement of the contentions on both sides, a concise statement of what the issues are, a statement of the relevant facts and a persuasive conclusion. So you are not buying someone who has never done any kind of judicial work but in fact has been a judge and has articulated his decisions with an explanation, plus the fact that I think you realize that a judge doesn't have very much except his own integrity. Until you all raised salaries, there certainly weren't much material benefits out of serving on the court. And I think that when you are doing appellate judging, you've got to put your views on the line in public every time you make a decision, and nothing is more important than to be fair. You can't shade; you can't leave out a couple of facts in order to reach the conclusion that you want because the parties of both sides know those major facts. So you are called upon to tell it like it is within the framework of what are the precise contentions.

There is a lot of difference between being a lawyer before you go on the bench or being an administrator of a judicial education project and expressing viewpoints off the top of your head and making a decision on a precise question of law with contentions from both sides, and both sides looking at what you decide and how you decide it.

Senator KOHL. Thank you.

Senator THURMOND.

Senator THURMOND. Thank you very much, Mr. Chairman.

I want to take this opportunity to welcome this panel here today. I think each of you have brought out points that are very important. You know Judge Thomas, and you know of his activities, and you have firm convictions as to whether he'd make a Supreme Court Justice.

Now, I'm not going to take a lot of time. I just want to ask you two questions. I think this is the essence of this hearing. The first is—and we'll start with Ms. Norton and then on to Mr. Thompson, Mr. Kern, Ms. Bracher and Ms. Holmes, in that order—I will ask the same question to all of you. Is it your opinion that Judge Thomas is highly qualified and possesses the necessary integrity, professional competence and judicial temperament to be an Associate Justice of the United States Supreme Court?

Ms. Norton.

Ms. NORTON. Yes, that is certainly my view. I have looked at his record. I am not personally acquainted with him, so I cannot speak with the 20 years' worth of personal knowledge that other panel members can address, but I can look at the way in which he has functioned as a judge and the way in which he has made his decisions. They are exceptional decisions in the way in which they deal with the role of the judiciary, the role of an appeals court. He was very careful to act within his role and to act appropriately.

Senator THURMOND. So your answer is "Yes"?

Ms. NORTON. Yes.

Senator THURMOND. Mr. Thompson.

Mr. THOMPSON. Senator, my answer is yes, and my answer is based on not only my friendship and knowledge of Judge Thomas, but the fact that I am a lawyer, and I am a citizen, and I am very much concerned about having quality people on the U.S. Supreme Court.

Senator THURMOND. Mr. Kern.

Mr. KERN. Yes, sir.

Senator THURMOND. Ms. Bracher.

Ms. BRACHER. Yes, and my knowledge is based upon his writings in the criminal law area, and as a woman and a citizen, I can say yes.

Senator THURMOND. Ms. Holmes.

Ms. HOLMES. Yes, definitely so. And my answer is based on having known Judge Thomas for over 20 years and having seen him not only in the positions that he has carried out but also in informal meetings with him.

Senator THURMOND. Now, my second question is this, and I will ask it of each one of you: Do you know of any reason why Judge Thomas should not be made a member of the Supreme Court of the United States?

Ms. Norton.

Ms. NORTON. These hearings have extensively dealt with every aspect of his record and of his approach to being a justice, and I believe that this committee has before it the information that would show that he will be an exceptional choice for that position. I know of nothing that would bar him from that position.

Senator THURMOND. So your answer is "No".

Ms. NORTON [nodding].

Senator THURMOND. Mr. Thompson.

Mr. THOMPSON. Senator, I know of no reason why this body should not confirm President Bush's choice for the U.S. Supreme Court.

Senator THURMOND. Mr. Kern.

Mr. KERN. No, sir.

Senator THURMOND. Ms. Bracher.

Ms. BRACHER. No, sir.

Senator THURMOND. Ms. Holmes.

Ms. HOLMES. No, Senator.

Senator THURMOND. So all of you have answered "Yes" to the first question and have answered "No" to the second question. I think that's the essence of the whole hearing, just what you have answered in those two questions.

Thank you very much for your appearance. This is a very intelligent panel. I congratulate you on your appearance.

I have no further questions, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Thurmond.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, I too thank the witnesses for coming. Your testimony was very moving and useful and very helpful and important to us, and we appreciate it, and I thank you for it.

Senator KOHL. Thank you very much.

Senator Heflin.

Senator HEFLIN. I apologize, I didn't get to hear all of your previous testimony. As many of us do, I have many other things going on, and we have to leave the hearing room and come back. So you may have answered this question, but what political party do each of you belong to?

Ms. NORTON. I am an elected Republican.

Mr. THOMPSON. I am a Republican, Senator.

Mr. KERN. I was appointed by President Lyndon Johnson after serving as an executive assistant to Attorney General Ramsey Clark.

Senator HEFLIN. What are you now?

Mr. KERN. As I have aged, Senator, my views have moved a bit more to the center than they were when I served with Attorney General Clark, whom I admire very, very much and have a deep personal regard and affection for.

Senator HEFLIN. You still haven't answered my question. [Laughter.]

Mr. KERN. I am registered an Independent in the District of Columbia.

Senator HEFLIN. All right. Ms. Bracher.

Ms. BRACHER. I am registered as a Republican in the State of Virginia.

Ms. HOLMES. I am registered as a Republican in Massachusetts.

Senator HEFLIN. All right. Ms. Bracher, you seem to have read a good deal of Judge Thomas' opinions on the Court of Appeals. Unfortunately, I don't have the cases before me, but two of those cases, according to my memory, were *United States v. Long* and *United States v. Harrison*. In regard to part of the decision in each—there were several issues involved—but one issue was the possession of a weapon during a drug raid where drugs were actually present, and the defendant in both these cases was convicted of the possession of a weapon, which carries more severe penalties with it. Both involved the constructive possession of a weapon. Judge Thomas went one way—it seems to me that he found for the

defendant in *Long*, and he found for the Government in the case of *U.S. v. Harrison*.

Now, in reading those cases, I was somewhat confused, and I wanted to ask him about it, but there were other matters that I thought were of higher priority. But are those decisions consistent in your judgment, and if so, why?1

Ms. BRACHER. Yes, they are consistent. As a matter of fact, they exemplify Judge Thomas' careful review of the statute. In *Long*, he looked at the statute and realized that in order to establish constructive possession, he must find that the defendant actually—and this is in quotes—“used the gun.” To find that—he used in *Long*—the gun was located in the cushions of the couch. The defendant was coming into the room where the gun was located, and Judge Thomas stated that the prosecution failed to offer any evidence that he had actually or constructively used the gun or had it in his possession.

In contrast is the *Harrison* case where you had—I believe there were three people in a van with a gun under the seat, one person with a gun on his person, and the third person was found to have constructively possessed the gun by means of the other two persons in his proximity in the van.

Senator HEFLIN. As I recall, one of the reasons Thomas said was that if a bullet had been fired towards the defendant, the one that didn't have a gun, it was reasonable to assume that he could get a gun and fire back, which seemed to be some rather nebulous thinking relative to that.

Ms. BRACHER. Well, I believe you are referring to the *Harrison* case where the three gentlemen were in the van. Ms. Norton spoke on the case similarly where they were in possession of cocaine; one had a bulletproof vest on; they had a temporary license, unregistered gun; and the other gentleman actually had a gun on his person, and they were involved in cocaine dealings. Whereas, the other situation was a person who wasn't in the room where the gun was, he was alone, and just entering the room, and Judge Thomas found the fact that the gun was present in the room was not sufficient because if he had, there would be no limits. And the statute clearly required some boundaries and parameters to be set.

Senator HEFLIN. So you think that there is a factual distinction in his analysis of whether or not the defendant in each of these cases was in constructive possession of a gun?

Ms. BRACHER. I don't think it is just factual. I think it is the constructive possession, the law as it is written in interpretation, and the application of the precedent and the finding that it is actually used within the precedent set by the Court and the interpretation of the statute. It is not just on the factual ground.

Senator HEFLIN. That is all.

Senator KOHL. Thank you very much, Senator Heflin.

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

I appreciate very much your testimony. I think it brings a lot of common sense to the support of Judge Thomas. Most importantly, it doesn't seem to be a shrillness voice in support of him, as we have had a lot of shrill voices in opposition to him. I think the lack of shrillness will sell better with the American people who oppose

or, particularly those who are watching, are still showing tremendous support for Judge Thomas.

My questioning has been a little bit touched upon by my colleague from South Carolina, Senator Thurmond, but I would like to proceed with those who have read the opinions. A couple of you referred to the fact you had read these opinions, and I want to say thank you for doing that because I think that brings a lot of knowledge to this committee, although we and our staff have had an opportunity to look at these opinions as well. It makes me feel good for those of you who have read the opinions that you have based your judgment and support of him to a considerable extent on what he has written.

The reason why I am glad for this is we did have some law professors here within the last few days who said Judge Thomas was not in the mainstream, and I asked them if that was based upon their reading of his opinions. Quite frankly, I was astonished that they had not read his opinions at all and they still had this judgment of him.

Ms. Norton and Ms. Bracher, is there any question, after reading these views of Clarence Thomas expressed through his opinions, that he is a mainstream jurist who is going to look at the written law and precedent to construe that law and who is going to look at the Constitution, the Framers' intent, and the precedent set by previous Supreme Courts in the interpretation of that Constitution? Ms. Norton?

Ms. NORTON. There seems to be a great concern that he will start bringing policy views unrelated to the Constitution into his judicial decision-making. I found absolutely no evidence of that in reviewing his decisions. His decisions were very carefully written, very carefully relied on precedent, on the exact language of statutes, on the proper role of an appellate court as compared to a trial court, and on the proper role of an appellate court compared to the U.S. Supreme Court. And I found his opinions to be just exceptional in the extent to which they were very carefully confined within the appropriate role of a judge.

Ms. BRACHER. I would also like to add I agree with Ms. Norton, but he has written opinions and they are joined by the judges on the D.C. Circuit considered to be on both sides of the political spectrum. And I would go one step further. Upon a reading of his opinions, I believe that every Senator could take comfort that Judge Thomas is a judge who will rule according to the law. His policy views and the policy positions that he has taken have not come into play when he has written his judicial opinions. He construes statutes as they are written with the intent of Congress, and he has ruled very narrowly on the precedent of the Court.

He even has gone so far as when precedents in other circuits have been to the contrary, he will review those precedents. He will distinguish them and explain where his rulings are coming from, and they are coming from the law.

Senator GRASSLEY. For those of you who would want to express a view, for those of you who support Judge Thomas—and all of you do—I am interested in whether viewing him not just as a jurist but as a whole person, do you think that he brings any special qualities to the Court that may not be there in some other Justices? Or do

you think that he is probably a duplicate in the sense of some other qualities that are on the Court already?

Mr. KERN. I would answer that by saying that I recall when his nomination was announced and his mother was interviewed on television, and she said, "He knows where he comes from, and he is never going to forget that."

When I would face the Supreme Court in the role of an advocate, I would see people from a variety of backgrounds and people with a variety of experiences, including an all-American football player and a Harvard Law Review member and a Chicago Law School professor.

It seems to me that Clarence Thomas, with his background and his life experiences that have been immeasurably different from, let's say, the last nominee—that is not to say that one has been better than the other, but they have been vastly different—I think he would bring a quality to the Court, a facet to the Court that is not now presently represented.

Senator GRASSLEY. And you are expressing that as a positive thing, that that ought to be present, a quality that ought to be present on the Court?

Mr. KERN. Absolutely. I would feel more comfortable as an advocate with that kind of component added to a multi-judge Court.

Mr. THOMPSON. Senator, I would add to what Judge Kern said, and that is, in addition to his background, arising from his background as a black American who grew up in the 1960's and has moved on, I think he would bring to the Court a demonstrated independence of thought, and the fact that he has valuable hands-on experience in the public policy arena as heading a major public agency such as the Equal Employment Opportunity Commission. I think those two ingredients, in addition to what Judge Kern said, his independence of thought and his public policy experience would be valuable additions to the Court, not only being on the Court but inside the deliberations of the Court. I think that would be a very positive factor.

Ms. HOLMES. Senator, I sat here thinking about what can he bring. To me the most important thing is you have to know who you are and where you have come from, and he certainly knows that, as it has been demonstrated over the past few days.

Judge Thomas, with his integrity, his sensitivity, his compassion, even though others on the Court have that, he still is going to bring a different dimension to the Court.

Ms. BRACHER. I would just like to add that beyond his experience and keen intellect, the experience that he has from serving on the D.C. Circuit, from serving in the executive branch, I find Judge Thomas to be inspirational, that someone with his background has done what he has done, and it proves to me that with hard work I can do anything I want to do. And I think that he represents what is best in all of America. And I think he brings that to the Court along with his background.

Senator GRASSLEY. Mr. Chairman, I have no further questions. Thank you all very much.

Senator KOHL. Thank you very much, Senator Grassley.

Senator SPECTER. Thank you, Mr. Chairman—

Senator KOHL. I am very sorry, Senator Specter. Senator Simon. Forgive me.

Senator SIMON. I have no questions for the panel, Mr. Chairman. Thank you.

Senator KOHL. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Norton, in the case of the *United States v. Lopez*, Judge Thomas sat on a panel which remanded the case for resentencing under the Uniform Guidelines, notwithstanding a provision which prohibited the consideration of socioeconomic factors, where the argument was made by the defendant's lawyer that the defendant should be entitled to special consideration because of his home background, the circumstances of his mother's murder by the father, the defendant's problems growing up, and the threats made by the father against the young defendant. And the United States attorney prosecuting the case made the argument that if socioeconomic factors could be broadened or if those factors did not come within the ban, that socioeconomic factors should not be considered. There would be very wide latitude for trial courts to consider the background of individuals, and we would not have the desired uniformity in sentencing procedures.

What is your view of the Court's ruling in that case in the context of the argument made by the prosecuting attorney?

Ms. NORTON. I am sorry. I have seen a summary of that, but I have not seen the entire decision that was rendered in that case, and so I cannot comment in detail on that.

Senator SPECTER. Well, that was a matter that I had asked Judge Thomas about when he was testifying here, but I thought that you might have some knowledge of it.

Perhaps you do, Ms. Bracher. You had analyzed Judge Thomas' opinions, and I realize this was not one of his opinions. But if you are familiar with it, I would be interested in your observations on the case.

Ms. BRACHER. Unfortunately, no, I am not. I limited my research into the opinions that he authored. The similar opinion I found that he did author, not having read *Lopez*, is the *Chavez* decision where he reviewed the length of the sentence under the Federal Sentencing Guidelines. In his review of the Federal Sentencing Guidelines, the opinion is replete with discussion on its terms of textual analysis and construing the Sentencing Guidelines according to the intent of Congress.

Not having read the *Lopez* decision, I am not sure if that is helpful. But that is the philosophy he used in reviewing the decision in that case.

Senator SPECTER. Judge Kern, where you have the uniform sentencing guidelines precluding a trial judge from considering socioeconomic factors, do you think it is a fair interpretation for the court to consider the background of an individual defendant, where there were severe marital problems between the defendant's parents, the father apparently killed the mother, the kinds of things that I described earlier?

Mr. KERN. I think it is obviously a judgment call, when you are faced with what would appear to be a restrictive statutory demand that there be a limitation, but at the same time you are confronted

with a case in which a significant element is the extraordinarily troubled background of the defendant. I think it is a pull and a tug, and it would not disturb me to find—I am not familiar with the facts of the case, but it would not disturb me to find a certain leeway where the trial court could take that unique particular factor into consideration.

Senator SPECTER. You are not troubled by Judge Thomas' joining in that opinion?

Mr. KERN. No.

Senator SPECTER. Ms. Holmes, I believe you were in the hearing room this morning when the panel testified on the abortion issue and opposed Judge Thomas on the concerns they have on what might happen with *Roe v. Wade* and the issue of sensitivity to women's concerns in that kind of a situation? You heard that?

Ms. HOLMES. Yes.

Senator SPECTER. What is your evaluation, if you care to give one, as to how you think Judge Thomas might respond to sensitivity for women's concerns, especially for African-American women?

Ms. HOLMES. Senator, my organization, the National Black Nurses Association, has a great concern about the abortion issue, but we have not come out with a position statement on abortion, and anything that I would say here today would be construed as coming out from the association. Therefore, I would rather not make any comment on that.

Senator SPECTER. Well, I respect that, Ms. Holmes. Would you have any comment to make on your view as to his sensitivity on women's issues, generally?

Ms. HOLMES. He is going to be fair, he certainly is going to read all the opinions, sit down and meditate on it and think about it, and whatever he comes up with as his decision, I am sure that it will be something that has taken great thought.

Senator SPECTER. Mr. Thompson, I could not be present during your testimony. I came in shortly after you finished, but I understand you had testified in support of Judge Thomas, of course, but some difference in view with Judge Thomas on affirmative action. Do you agree with his position on affirmative action?

Mr. THOMPSON. I did not testify with respect to any difference of opinion, as I understand his views on affirmative action, so I do agree. As I understand what Judge Thomas' views are on that subject, Senator, I do agree with his views, but I think that his views on affirmative action as they have been portrayed in the media have been misinterpreted.

I do not view and understand Judge Thomas to take the position that he is opposed to all forms of affirmative action. He is opposed to quotas, as I am, but he understands that some forms of affirmative action are necessary, because they are really truly needed to make some of our individual rights and aspirations a reality, and they are fair. But he is opposed to quotas, and so am I.

Senator SPECTER. Well, with respect to his opposition to quotas, he was emphatic about that, and I think there is general agreement that quotas are bad. He did testify about agreeing to limited affirmative action in an educational context, and there was considerable discussion about his own experience. But he did oppose affirmative action in an employment context, unless the affirmative

action was directly remedial to a specific individual who had been discriminated against, and that he would not favor affirmative action if it would put the group in the place where the group had been, but for a generalized discrimination. Do you agree with that point on Judge Thomas' stand?

Mr. THOMPSON. Yes, I do. But I would also like to respond beyond that and indicate something and reiterate something I said in my direct testimony, and that is people may differ on affirmative action and people may differ with respect to how black Americans, in general, need to advance and overcome some of the problems that we face, but I do not believe that that difference of opinion should be a reason for this body to deny Judge Thomas' confirmation to the United States Supreme Court.

As I said in my testimony, I think this difference of opinion within the black community as to how we should advance, how we should and can attack the problems that we face is deeply rooted in this country's history, beginning with the differences of opinion between W.E.B. DuBois and Booker T. Washington, and I believe that this difference of opinion is a source of strength in the black community and in the Nation as a whole, and this difference, you should not use this difference to get off track and use it as a basis for confirming or for denying the confirmation of Judge Thomas.

Senator SPECTER. Mr. Thompson, how long have you worked with Judge Thomas at Monsanto?

Mr. THOMPSON. I worked with him for approximately 2 years.

Senator SPECTER. And you dealt with a great many legal issues during that 2-year period?

Mr. THOMPSON. We dealt with a great many legal issues that many young lawyers in our corporate law department would have to face.

Senator SPECTER. The American Bar Association rated Judge Thomas qualified, as opposed to being well qualified. How would you rate him?

Mr. THOMPSON. I would rate him well qualified, and I think, as I understand the American Bar Association's recommendation, I think it is unfairly tilted to the litigation experience of a lawyer, not just Judge Thomas, but any lawyer who is being viewed for a judicial position, and certainly discounted and did not take into consideration his public policy experience as the head of the EEOC or a major agency such as that. I would rate him well qualified.

Senator SPECTER. Thank you, Judge Thompson. Thank you, ladies and gentlemen.

Thank you, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Specter.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

I suppose in hearings of this kind, it is natural that you would have both proponents and opponents. I think that is the purpose of the hearing, to allow both sides to come and speak, but one of the phenomenons that we have had is that the people who seem to know the Judge and have a personal contact with him all seem to be proponents, and the opponents seem to be made up of those who haven't had a chance to get to know him personally.

Senators do not always have that experience with regard to what people form views of them, so it is somewhat refreshing to have this phenomenon come up. It is particularly, I think, helpful to have people who have read the Judge's decisions. We have had a number of people testify on his judicial temperament and demeanor and how he would rule, but, unfortunately, many of them, as Senator Grassley has pointed out, have not had the opportunity to read his decisions, so this panel comes particularly well prepared and we appreciate your insights as a result of that.

Mr. Thompson, you having worked with the Judge, I wonder if you might share some observations about his work habits, his approach to problems, his temperament in the years you worked with him in corporate law.

Mr. THOMPSON. He was as very, very hard worker. He took his job serious. We both, as young lawyers in a corporate law department, faced many technical issues with respect to drafting long contracts and purchase agreements, and analyzing the myriad of regulations that a large corporation has to deal with. We both had many problems with respect to having to deal with that.

I recall Judge Thomas putting in many long hours, trying to grapple with the issues and master his craft, as you have to do as a young lawyer, and we spent a lot of time together. While we did have an opportunity to talk about some of the public policy issues facing the day, much of the time that we spent together was faced really trying to understand and grapple with the technical issues that we both faced, as young lawyers in a corporation, and I think that dedication to mastering his craft, his willingness to work hard, his desire to want to do a good job, these are all qualities that will serve him well on the U.S. Supreme Court.

Senator BROWN. Young attorneys, particularly, although I suspect attorneys generally, become advocates for their client, as indeed they are paid to do. Some become very strong advocates in the very competitive way. Some temper that advocacy with a sense of justice and fair play, as the ethics require to be honest, to not misrepresent facts, even though they are strong advocates of a viewpoint. Are there any observations you might share with us as to what kind of an advocate Clarence Thomas was in those early years, even-handed, able to see both sides or simply somewhat narrow-viewed advocate?

Mr. THOMPSON. Senator, if I can respond to your question based upon my knowledge of his tenure at the EEOC, and there he took over an agency in which many of the career professionals, I would think it is fair to say, had some strong differences of opinion with respect to affirmative action and some issues that Judge Thomas held strong views on.

But, notwithstanding these differences, many of the career professionals that I have talked with, who know Judge Thomas and his work at the EEOC, have nothing but praise and respect for him. They understand his fairness and his ability to see both sides, because many times he retreated from some of the very strongly held abstract views he had, in the face of the reality of running this agency and trying to serve its constituents and trying to protect American citizens from unlawful employment discrimination.

He did that and he took his job seriously, and I think that goes to his character and that goes to his integrity.

I don't know if you had an opportunity to hear my direct testimony, but this past weekend I talked to one of those career professionals in Atlanta, he has just retired from the EEOC after many years, and he will acknowledge that he and Judge Thomas differ on some issues, but he has nothing but praise and respect for Judge Thomas. He says, "I tell my friends that if they don't want to change their views on him, those who are critical of him, if they don't want to change their views on him, then they shouldn't get to know him, because once they get to know this man, they will respect his character, his integrity, his intellect, and all of the unfair and unfounded criticism of him will go aside."

Senator BROWN. Thank you.

Attorney General Norton, you have read, I take it, the criminal cases that Judge Thomas has written on the Circuit Court of Appeals?

Ms. NORTON. That is right.

Senator BROWN. In reviewing those decisions and opinions, have any dissents been filed in connection with those opinions?

Ms. NORTON. There were not dissents filed to any of those. There was one concurring opinion in one of the cases. It is the same opinion that has been discussed extensively on the interpretation of using a firearm, and in that case the one concern was that perhaps there had been too much of a burden placed on the Government to show the use of a firearm, and that was one that, nevertheless, concurred very much in the result.

Senator BROWN. Does the fact that there weren't dissents lead you to an impression of whether the Judge was in the mainstream of legal thinking or not?

Ms. NORTON. Certainly in the cases that I have examined, he was very much in the mainstream and very much presented a balanced view in his treatment of those cases.

Senator BROWN. In reviewing his opinions, do you have a view of whether or not the Judge would be overly strict with regards to the doctrines of standing or mootness? Would he have a tendency to deprive individuals of access to the court?

Ms. NORTON. I know that in some documents that have been presented by various organizations to this committee there have been some concerns about his views on standing and access to the courts. But having reviewed those decisions and Judge Thomas' concurring and dissenting views in those cases, I believe his views were very much in the mainstream on those cases. Questions of standing are often very difficult to decide for the courts, but his analysis was the traditional analysis.

Senator BROWN. Thank you very much. I thank all the panel for their testimony.

Senator KOHL. We thank you very much for appearing here today. You have been very helpful.

Senator THURMOND. Thank you very much for your appearance.

Senator KOHL. Our next witness today is Mr. Lane Kirkland, President of the AFL-CIO. Mr. Kirkland has been a distinguished spokesperson on behalf of working people of America for many,

many years, and we are honored and privileged to have him here with us today.

Mr. Kirkland, we would appreciate it if you could summarize your remarks in 5 minutes or as close to 5 minutes as possible.

**STATEMENT OF LANE KIRKLAND, PRESIDENT, AFL-CIO,  
ACCOMPANIED BY LAWRENCE GOLD, GENERAL COUNSEL**

Mr. KIRKLAND. Thank you, Mr. Chairman.

I have submitted a full statement for the record. I will give you a summary as briefly as I can. I have with me Lawrence Gold, who is the general counsel of the AFL-CIO, and a frequent practitioner before the Supreme Court and knowledgeable on legal matters that are too esoteric for me.

Mr. Chairman, members of the committee, thank you for the opportunity to testify on the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States.

In early August, the AFL-CIO, acting through its executive council, determined to oppose Judge Thomas. Our determination was based on a careful study of his record as a Government official and as a participant in the ongoing public debate over the future direction of the country. What we found was deeply disturbing from the perspective of the trade union movement and of the working men and women who comprise trade unions.

For most of the past 10 years in his role as EEOC Chairman and as a writer and a speaker on issues of the day, Judge Thomas has fervently championed the ideological agenda of the far right and has done so without deviation. This committee has questioned Judge Thomas regarding his extreme ideological rhetoric and his attacks on the role of Government in defense of the least privileged of its citizens.

You sought the specifics behind his alarm that the Nation is—and I quote—“careening with frightening speed toward collectivism, coercive centralized planning, and a statist-dictatorial system”. You have examined his attacks on such perceived enemies of the right as Franklin Roosevelt and his “later-day political heirs”, and particularly the judge’s scorn for their “attack on property rights”. And you have reviewed with Judge Thomas his writings that expound his view that—quoting again—“the government’s role is to assure a climate in which business can flourish and then stand back and stay out of the way.”

These quotations on their face, and as Judge Thomas has elaborated on their meaning, are sufficient to explain our opposition to his nomination. Judge Thomas quite simply has a misunderstanding, in our view, about America’s historical experience, the role of democratic government in enabling Americans to create a more just and humane civil society, and the value of the social programs designed to meet the legitimate needs of the average working American.

Our child labor laws, environmental laws, securities and banking laws, and product safety and workplace safety laws are examples of the kind of Government action we take for granted today and that Judge Thomas has scorned.

From the building of the intercontinental railroads to the space program, from Social Security to the GI Bill of Rights, and from the Fair Labor Standards Act to the Occupational Safety and Health Act, the truth of the matter is that the Government's role has been to address social and economic problems in a way that ameliorates the abuses and failings of the marketplace and thereby strengthens it, and also recognizes our human needs.

Judge Thomas does not grasp that truth. His public statements and writings assert that this body of legislation is not merely un-sound but repugnant. In his view, these basic statements about reciprocal obligations to each other are "antithetical to freedom".

Judge Thomas' idea that democratic government actions dangerously erode property rights is an absurd and dangerous one in the modern era. Just ask the families of those 25 workers who died behind locked doors a couple of weeks ago in an uninspected North Carolina chicken plant. They don't believe that assuring an employer's unfettered property rights is the answer to all social problems. They just want to know why their Government did not even attempt to protect the basic human rights of their loved ones, particularly their right to life, liberty and the pursuit of happiness.

One of the Supreme Court's primary functions is to interpret the statutory enactments I have just enumerated. It defies reason to believe that Judge Thomas will understand and transmit with full and sympathetic discernment the meaning of the entire body of economic regulation he has so passionately attacked. That, we believe, is a more than sufficient reason for rejecting the nomination.

In light of his recent testimony before this committee, our belief that a person of Judge Thomas' views should not ascend to the Nation's highest court is now matched by a deep concern over the possibility that he will do so without having to discuss or defend those views as part of the Senate confirmation process.

The approach taken by Judge Thomas and the administration threatens to turn these hearings into an empty ritual rather than an integral part of a joint executive branch/legislative branch decision on the composition of the judicial branch.

Judge Thomas has refused either to disavow or accept any of his past hard right rhetoric and has sought to dismiss nearly ten years of his public life as beside the point because he was serving in the executive branch and not in his impartial role as a judge.

I hope it has occurred to more than a few people in this room that Judge Thomas' role as a judge is not the reason he was nominated to the Supreme Court. Eighteen months and 20 opinions do not a justice make.

Rather, Judge Thomas' accomplishments, and we believe the basis upon which he was selected by the President, are as a gladiator in the ideological arena. His pamphleteers' ability to reduce complex questions to caricatures and to belittle those who have a different social vision made him a hero of the right and its candidate for Justice Marshall's seat. But admitting that this was the basis of his selection and will be the basis of his judicial decisions would be a fatal blow to the nomination. Consequently, Judge Thomas' calculated strategy—or that of his "handlers"—is to avoid all responsibility for prior public statements and positions; tell them as little as possible of substance; assert a sweeping and strip-

ping mental expunging of very recent, strongly-expressed views—a most unconvincing display of self-abnegation.

This transparent effort to create an image of moderation and open-mindedness out of a record that demonstrates their very opposites strongly suggests mental reservation and a purpose of evasion.

Such manipulation of the confirmation process debases the public discourse and denies the Senate its constitutional prerogative to advise and consent on Supreme Court nominees.

The AFL-CIO does not believe the Senate should acquiesce to the President in his plan to make the Supreme Court—the nine persons, the highest nonelected office in our land, the nine persons who now have the virtual power by interpretation to rewrite the Constitution for our times—the unchallenged preserve of a narrow and privileged segment of American opinion.

We respectfully ask that the committee reject the nomination of Judge Clarence Thomas.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kirkland follows:]

STATEMENT BY LANE KIRKLAND, PRESIDENT, AMERICAN  
FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS, BEFORE THE SENATE JUDICIARY COMMITTEE, ON  
THE NOMINATION OF CLARENCE THOMAS TO BE AN ASSOCIATE  
JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

September 19, 1991

The AFL-CIO appreciates the opportunity to testify before this Committee on the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States.

When these confirmation hearings began, the question was whether Judge Thomas should be entrusted with the high privilege and responsibility of serving on the Nation's highest court. We had studied the Judge's record as a government official and as a participant in the on-going debate out of which the law is formed.

We found Judge Thomas' record wanting in two absolutely fundamental respects. His government service was marked by an unwillingness to fully enforce the anti-discrimination laws in accord with congressional intent. His speeches and writings were strident advocacy of the ideological agenda of the far Right.

On these bases, we concluded that Judge Thomas should not be confirmed, and we were prepared to come before this Committee to explain our conclusion.

Now that Judge Thomas has finished his testimony, an added question needs to be addressed: whether the confirmation process is being manipulated in a manner that debases the public discourse and denies the Senate its constitutional prerogative to

advise and consent on Supreme Court nominees. We believe that this question must be answered in the affirmative and that this answer provides a powerful additional reason for rejecting this nomination.

#### I.

Judge Thomas's nomination does not have a firm foundation in his professional accomplishments as a lawyer, legal scholar or judge. Unlike Justice Marshall, Judge Thomas was never at the forefront of the practicing bar; indeed, he spent only five years as a practitioner at a junior level. By his own admission, Judge Thomas is not a legal scholar; his only published legal writings are a handful of occasional essays, several of which are little more than reprints of speeches. And unlike five of the current members of the Court -- including the last two nominees to come before this Committee -- Judge Thomas does not have an extensive record as a judge; his judicial career spans just eighteen months and has produced only twenty opinions, none of which would be of even passing interest to students of the law were it not for Judge Thomas' nomination to the Supreme Court.

Judge Thomas' accomplishments -- and the basis upon which he has been selected by the President -- are as a gladiator in the ideological arena. As others have demonstrated, this was a substantial part of his role as EEOC Chair, and -- even more clearly -- this was his role as a writer and speaker on the issues of the day over the last decade. Judge Thomas was a fixture at gatherings of the Right. His contributions were

consistently defined by an uncompromising advocacy of an unbending libertarian ideology. His pamphleteer's ability to reduce complex questions to caricatures and to belittle those who have a different social vision made him a hero of the Right and its candidate for the Supreme Court seat being vacated by Justice Marshall. We submit that this ability -- although it may well be a qualification for a place on the lawyer's side of the bar -- is not a qualification for a seat on the Nation's highest Court.

## II.

### A.

This Committee has carefully questioned Judge Thomas regarding the extreme anti-government ideology he has repeatedly and consistently espoused, including his attacks on compassionate government in general, and on a host of social programs designed to recognize the legitimate interests of the average working American in particular.

The Committee has probed Judge Thomas regarding his exaggerated fear that the Nation "is careening with frightening speed toward collectivism ... coercive centralized planning ... [and] a statist-dictatorial system."<sup>1</sup> Committee members have questioned Judge Thomas regarding his statements paying homage to the icons of the Right from Ayn Rand to Oliver North.<sup>2</sup> And

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<sup>1</sup> Thomas, Speech to CATO Institute (April 23, 1987) at 24 (quoting Williams Simon).

<sup>2</sup> Thomas, Address for Pacific Research Institute (Aug. 10 [no year given]) at 1; Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years (D. Boaz ed. 1988) at 399.

Committee members have reviewed with Judge Thomas his attacks on such perceived enemies of the Right as: Franklin Roosevelt and "[h]is later day political heirs" (who Judge Thomas condemned for their "attack on property rights")<sup>3</sup>; Congress (which Judge Thomas attacked as "irresponsible" and "out of control")<sup>4</sup>; and the Supreme Court (which, according to Judge Thomas, has made "itself the national school board, parole board, health commission, and election commission, among other titles").<sup>5</sup>

We would add only the following point of emphasis.

Throughout the course of this century, Congress has deemed it appropriate from time to time to place restrictions on the unfettered operation of market forces in order to pursue important social goals. Our environmental laws, product safety laws, securities laws, and banking laws, as well as the variety of workplace regulations from the prohibition on child labor to the mandate of workplace safety are among the examples we take for granted today. Congress, too, has enacted a variety of social welfare laws to assure a fairer distribution of benefits and burdens than that which the market would otherwise produce.

The Supreme Court is, of course, the final arbiter as to the

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<sup>3</sup> Thomas, Rewards Belong to Those Who Labor, in The Washington Times (Jan. 18, 1988) at F.4.

<sup>4</sup> Thomas, Remarks to the Federalist Society for Law and Public Policy Studies, University of Virginia School of Law, Charlottesville, VA (March 5, 1989), at 13.

<sup>5</sup> Thomas, The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive (Speech at the Toqueville Forum, Wake Forest Univ.) (April 18, 1988) at 8.

meaning of these laws, and much of the Court's docket is taken up with deciding such statutory interpretation questions. Judge Thomas' public statements make it clear that he views this corpus of legislation as not merely unsound but morally repugnant. In his view, these basic statements of our reciprocal obligations to each other are "antithetical to freedom."<sup>6</sup>

Judge Thomas' writings in this area are extreme in both their content and their tone. In his view, "the government's role is to assure a climate in which businesses can flourish and then stand back and stay out of the way."<sup>7</sup> He warns that those who seek "such programs as income redistribution, compensatory job training, compensatory schooling, special medical services, and the like" have embraced "simplistic temptations" that would create an "economically stagnant . . . social welfare regime" and "put us on the road to serfdom."<sup>8</sup>

Although he acknowledges that the kinds of government actions he disdains are part of a long-standing political tradition with "roots . . . in the Progressive Era[,] . . . the New Deal and the Great Society, in whose aftermath we find

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<sup>6</sup> Thomas, Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom, Lincoln Review Vol. 8, No. 2 (Winter, 1988).

<sup>7</sup> Thomas, Remarks to the Palm Beach Chamber of Commerce (May 18, 1988) at 1.

<sup>8</sup> Thomas, Visionary's Blurred View of Equality, in The Washington Times (Oct. 19, 1987) at E8.

ourselves today,"<sup>9</sup> he views this evolution as a "sorry tale" and he openly scorns this tradition as resting on an "egregious error," viz., a failure to understand that "freedom and security are mutually exclusive."<sup>10</sup>

Judge Thomas' extreme anti-government views betray a tragic lack of understanding regarding America's historical experience. As this Nation has proved, democratic government is not the enemy of freedom. Neither unfettered "property rights" nor unregulated markets answer all social problems. Democratic government is the means whereby Americans have always joined together to create for themselves and their posterity a more just, humane, and free society.

From government support of the intercontinental railroads to its support for the space program, from Social Security to the GI Bill and from the Fair Labor Standards Act to the Occupational Safety and Health Act, the Government's role has been to meet our economic needs in a way that recognizes our human needs. It is precisely because this is so that the labor movement advocates -- and has always advocated -- an active role for Government in this society.

But whether the views we have just expressed -- or those Judge Thomas has so single-mindedly advanced -- are in some ultimate sense "correct" is, for purposes of this Committee's

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<sup>9</sup> Thomas, Speech to Black Caucus Seminar on Public-Private Partnerships, Washington, D.C. (September 26, 1987), at 3.

<sup>10</sup> Id.

work, quite beside the point. The role of a Supreme Court Justice is not to decide social policy; rather, "his great, his demanding, his deepest task", as the late Paul Bator so elegantly argued, is "the art of interpretation" which calls upon the Justice "to understand and transmit, with full and sympathetic discernment, enterprises and purposes not of [his] own making but of others' making."<sup>11</sup> The great judge -- like the great musician -- must have an "inner ear for the music -- the true meaning of the text, an ability to transcend personal biases and preferences in order to ... hear and understand and transmit how the law was meant to be."<sup>12</sup>

Judge Thomas has not demonstrated that art. Indeed, it defies reason to believe that Judge Thomas can "transcend personal biases" and "understand and transmit, with full and sympathetic discernment" the meaning of the entire body of economic regulation he views with such contempt.

B.

Judge Thomas' responses to this Committee's questions on his writings and statements demonstrate that he -- or perhaps his "handlers" -- had a strategy to avoid any and all responsibility for his prior public statements and positions.

In his testimony, Judge Thomas -- refusing either to disavow

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<sup>11</sup> Address by Paul Bator on the appointment of Kenneth Starr to the United States Court of Appeals for the District of Columbia, Oct. 25, 1983, modified and reprinted in 734 F.2d XCIII, CI-CII (1983).

<sup>12</sup> Id.

or accept any of his past statements -- simply dismissed his life's work as beside the point. Time and again, when faced with his own words, Judge Thomas sought to explain away his inflammatory rhetoric by identifying some inoffensive commonplace and claiming that nothing more was intended. This transparent effort to create an image of moderation and open-mindedness out of a record that demonstrates their very opposites strongly suggests "mental reservation" and a "purpose of evasion."

Thus, for example, Judge Thomas' praise of Lewis Lehrman's article arguing that the Constitution bans abortions under all circumstances was meant, he now says, only to illustrate to conservatives the importance of civil rights.<sup>13</sup> His attack on the Supreme Court's decision upholding the special prosecutor law was meant only to remind us that "the structure of our Government" was designed "to protect individuals."<sup>14</sup> His statement that age discrimination often makes economic sense was intended to convey that the EEOC was "actually upgrading enforcement" of the Age Discrimination in Employment Act.<sup>15</sup> His advocacy of broad constitutional protections for "economic rights" was meant only to recognize that "the right of [his] grandfather to work deserves protection."<sup>16</sup> His assertion that government cannot be compassionate meant only that "people are

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<sup>13</sup> Sept. 10, 1991 Thomas Hearing Transcript, at 150-51.

<sup>14</sup> Sept. 13, 1991 Tr. at 15.

<sup>15</sup> Sept. 12, 1991 Tr. p. 113.

<sup>16</sup> Sept. 10, 1991 Tr. at 144.

compassionate."<sup>17</sup> And, his praise of Oliver North for defying Congress was meant merely to express that congressional oversight hearings "often become highly charged, politicized public events."<sup>18</sup>

Judge Thomas' attempt to characterize his hard-right rhetoric as down-home homilies cannot be squared with his own words or with a decent respect for our civic responsibilities when we take part in public debate. Honest, thoughtful discourse by public officials is a basic requirement of republican self-government. Judge Thomas' lack of fidelity to this obligation -- indeed, his utter lack of recognition that he has such an obligation -- is of paramount importance in evaluating his fitness for service on our highest court.

Nothing in this hearing can, in any event, erase the historical record. And the record is that for almost ten years Judge Thomas did not choose to speak in thoughtful and balanced terms, but, rather, as an ideological partisan. Why else has he been nominated to the Supreme Court whereas scores of other lawyers and judges of greater accomplishments and greater scruple have not? It is simply too late in the day for Judge Thomas to don a new persona and to ask to be evaluated as if his recently adopted demeanor is a true reflection of his inner substance.

### III.

Judge Thomas has also sought to distance himself from his

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<sup>17</sup> Sept. 13, 1991 Tr. at 86.

<sup>18</sup> Sept. 13, 1991 Tr. at 92.

record in public life by dismissing the significance of the entire body of his prior work. Judge Thomas asserts that his speeches were mere "philosophic musings"<sup>19</sup> of a "part-time political theorist."<sup>20</sup> And, more importantly, Judge Thomas argues that the entire body of his pre-judicial views should be "discount[ed]"<sup>21</sup> because it was produced while he was "in the executive branch" where he "tried to engage in debate and tried to advance the ball in discussions."<sup>22</sup> As a judge, he explains, his role requires him "to strip down from those policy positions,"<sup>23</sup> so as to "secure that level of impartiality and objectivity necessary for judging cases."<sup>24</sup> Indeed, Judge Thomas told the Committee that, as a judge, he no longer feels free even to "accumulat[e] points of view" about "current events and issues".<sup>25</sup>

Judge Thomas is, of course, correct in recognizing that we expect -- indeed demand -- "impartiality" from our judges. But impartiality is not achieved, as Judge Thomas seems to think, by "stripping away" the judge's values, opinions and the like, and closing one's mind to the intellectual currents of his time.

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<sup>19</sup> Sept. 10, 1991 Tr. at 142.

<sup>20</sup> Sept. 11, 1991 Tr. at 135.

<sup>21</sup> Sept. 13, 1991 Tr. at 105.

<sup>22</sup> Sept. 11, 1991 Tr. at 107.

<sup>23</sup> Sept. 12, 1991 Tr. at 20.

<sup>24</sup> Sept. 11, 1991 Tr. at 112.

<sup>25</sup> Sept. 11, 1991 Tr. at 109.

A good judge must be a restless, inquisitive and engaged thinker who strives to understand the full complexity of the issues that come before him. Chief Justice Rehnquist has put it well: "[p]roof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not neutrality."<sup>26</sup> Thus, as Justice Frankfurter explained, judicial impartiality is achieved not by "stripping down," but by the judge's ability "to discover and suppress his prejudices,"<sup>27</sup> and thereby "transcend [his] experience."<sup>28</sup>

A judge who follows Justice Frankfurter's dictum will still be influenced by his own values, attitudes, opinions and experiences. As Professor Stephen Carter has written, one "cannot hope for a complete separation of judgment from judge." Given the indeterminate nature of many of our texts -- both statutory and constitutional -- and of our constitutional and jurisprudential concepts, the process of judging will often rest on the judge's understanding of the world and on his values. As Professor Carter puts it, "in every interpretive task a moment arises when the interpreter's own experience and values become the most important data. That moment cannot be spotted in

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<sup>26</sup> Laird v. Tatum, 409 U.S. 824, 835 (1972) (Chambers opinion of Rehnquist, J.).

<sup>27</sup> Frankfurter, The Appointment of a Justice in Felix Frankfurter on the Supreme Court 211, 216-17 (P. Kurland ed. 1970).

<sup>28</sup> Frankfurter, The Supreme Court and the Public, *id.* at 218, 226-27.

advance ... but it is certain that the moment will come."<sup>29</sup>

Thus, try as he might, Judge Thomas cannot disassociate himself as a judge from himself as a person. As we have noted, his passionate hostility to government regulation cannot fail to influence his interpretation of statutes authorizing government regulation, and his antipathy towards Congress inevitably will influence his rulings as to the scope of congressional powers and so on.

This makes it all the more important for the Committee and the Senate to base their evaluation of the nomination on what Judge Thomas has said and done over the years, and not on the convenient but vague assurances that he now offers.

#### IV.

Judge Thomas' unwillingness to be judged on his public record also accentuates a pressing problem in the confirmation process that threatens to make the process an empty ritual.

In his testimony, Judge Thomas -- like Justice Souter, Justice Kennedy, Justice Scalia, and Justice O'Connor before him -- refused to discuss constitutional decisions or doctrines except in the airiest generalities. Like them, Judge Thomas confined himself to various bromides for our time: that he has no agenda other than to follow the law, that judicial restraint is a virtue, that stare decisis is to be respected, that Brown v. Board of Education and Griswold v. Connecticut were correctly

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<sup>29</sup> Carter, The Confirmation Mess, 101 Harv. L. Rev. 1185, 1198-99 (1988).

decided, and that Lochner v. New York was wrongly decided. More than that he -- like the nominees who have come just before him (with the notable exception of Judge Bork) -- would not say.

In past hearings, this refusal to engage the Committee in a candid discussion has been tempered by the fact that the nominee had a substantial record of professional achievement -- as a jurist, as a legislator, or as a legal scholar -- on which he or she could be evaluated. But even taking into account the utility of such "resume reviews,"<sup>30</sup> the recent experience demonstrates that the Senate is in danger of losing its check on a President who is intent on a Court in his own image.

The Reagan and Bush Administrations have purposefully and successfully placed on the Court four Justices who have joined with Chief Justice Rehnquist to form a voting block that has watered down the Bill of Rights, cut back the anti-discrimination laws, and increasingly denied access to the federal courts to those who must depend on the protections of the law. The pious platitudes those nominees voiced before this Committee have a hollow -- and bitter -- ring in the face of their voting records since confirmed.

The President has the prerogative to nominate Justices for ideological reasons, but the Constitution permits the Supreme Court to be so constituted only so long as the President and the Senate jointly decide that it should be so.

The Framers granted the Senate the power of Advice and

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<sup>30</sup> Carter, supra note 22, at 1187.

Consent, as Alexander Hamilton explained, to subject "the propriety of [the President's] choice to the discussion and determination of a different and independent body."<sup>31</sup> The Framers did so for two more than sufficient reasons.

First, the Judiciary has the ultimate responsibility for declaring the meaning and limits of the law. Its decisions will thus determine whether Congress' actions carry or miscarry.

Second, the Constitution creates a dynamic governance scheme whose driving force is a continuing creative competition between the Legislative and Executive Branches. The Court, in turn, elaborates the detailed rules of that competition out of the Constitution's text and its plan. This system of checks and balances is threatened if the Judicial Branch is the handmaiden of the Executive.

As Professor Charles Black demonstrated two decades ago, given the paramount importance of these functions, the Senate's role in passing on Supreme Court nominees is not merely "to screen[] out proven malefactors," but to determine whether a nominee's "service on the Bench will hurt the country." On reaching such a determination, "the Senat[e] can do right only by treating this judgment ... as a satisfactory basis in itself for a negative vote."<sup>32</sup>

Grover Rees put the same point this way: "The responsibility

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<sup>31</sup> The Federalist No. 76, (Bantam ed. 1982) 386.

<sup>32</sup> Black, A Note on Senatorial Considerations of Supreme Court Nominees, 79 Yale L.J. 657, 658, 663-64 (1970).

of the Senate to choose good Supreme Court Justices is just as great as that of the President;" thus "nobody should be appointed to the Court unless the President and a majority of Senators believes he would be a good Justice..."<sup>33</sup>

The AFL-CIO does not believe that the Senate should acquiesce to the President in his plan to make the Supreme Court the preserve of the Republican Party's far right wing.

We believe this Committee and the Senate have both the right and the duty to confirm only a nominee of the highest attainments whose record and testimony together establish a commitment to what is best in the law. We believe that this Committee must act to preserve the Senate's constitutional prerogatives in this regard. If a nominee is not required to demonstrate unquestioned accomplishments and is not required to state his approach to and his understanding of the law, what basis remains for an informed and intelligent Senate judgment?

Only by rejecting the nomination of Judge Clarence Thomas to the Supreme Court will this Committee restore the confirmation process to its proper place in the constitutional scheme and put a halt to the Administration's cynical "tell them nothing" strategy; a strategy that threatens to drain the Senate's role in the process of all meaning.

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<sup>33</sup> Rees, Questions for Supreme Court Nominees at Confirmation Hearings, 17 Ga. L. Rev. 913, 939, 966 (1983).

Senator KOHL. Thank you very much, Mr. Kirkland.

Mr. Kirkland, in 1988 when the committee was considering the nomination of Justice Kennedy, you wrote Chairman Biden of your organization's concerns with the nomination. You said at that time, and I quote: "In a number of areas of critical concern to working people, Judge Kennedy's record on the United States Court of Appeals for the Ninth Circuit is quite troubling, and his record is only somewhat reassuring in other areas." You went on to say that "he has shown only a limited appreciation of the legitimate needs and aspirations of women, of minorities, and of the other members of this society who over the years have been denied equal rights and opportunities." And yet in that statement you urged that Justice Kennedy be confirmed.

So what are the differences this time?

Mr. KIRKLAND. The differences this time, Mr. Chairman, are matters to some extent of degree. We had differences, of course, with the positions that typified Justice Kennedy's history, but we must acknowledge that those differences still left him within the spectrum of differences of a variety that don't dictate or urge us or compel us to oppose his nomination.

We believe that Judge Thomas' record is outside of that spectrum. And I think the fact that we did not oppose and in fact supported the confirmation of Justice Kennedy demonstrates quite fully that we do not go into taking such a position casually or without considerable concern and study and reluctance.

I think it demonstrates that our forbearance in these matters is very considerable, and perhaps in the light of Justice Kennedy's subsequent position on the court, perhaps that forbearance was misguided. We do not always do those things that we ought to have done; we sometimes do those things we ought not to have done, being human.

Senator KOHL. Thank you very much.

Senator Thurmond.

Senator THURMOND. Mr. Kirkland, we are glad to have you here. I have no questions. Thank you.

Mr. KIRKLAND. Thank you, Senator.

Senator KOHL. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I too want to join in welcoming Lane Kirkland, who speaks for working men and women all over this country. We are fortunate to have a leader of working men and women prepared to take positions on many of the important issues of our time that affect working men and women.

I am interested in why you think that the interests or the rights of working men and women might be threatened with Judge Thomas on the court. Is it perhaps the way that he views various statutes and construes them in an apparently extremely narrow way? I won't ask you about his statements opposing minimum wage or Davis-Bacon or parental leave, or his recommendation actually for the abolition of the Labor Department, the Agriculture Department—an agriculture department that looks after a number of different programs, but certainly health and safety issues, in terms of food supply, obviously, and a wide range of different issues including occupational health and safety.

Do you draw from the range of different comments on a wide variety of different economic issues that Judge Thomas would not provide the kinds of protections for working men and women that you think should be at least evidenced by a nominee to the highest court of the land?

Mr. KIRKLAND. His record, as we have found it on the record over a significant period of time and up until very recently, has been one of consistent expressed and strongly expressed hostility to the pattern of laws and social and economic programs that have been developed in this country through experience and after considerable sacrifice, and after disasters have occurred and proven their necessity. His record in that regard has been consistent, and I have no reason to believe that they do not represent his deeply-held views.

I cannot believe that they were simply opportunistic expressions designed for a particular audience.

Senator KENNEDY. So you think that his expressions about entitlements, for example, his opposition to the economic interests of working men and women, and his expressions about, as you point out, hostility in terms of a wide range of different legislative initiatives to try and provide some degree of economic justice, you think that the correct interpretation of those statutes—not so much with regard to this particular question about the constitutionality of them—most of them obviously have been upheld from the constitutional point of view—but there are going to be many statutes that affect working men and women that are going to be interpreted by the court over the period of the next 10 or 15 years, and it is difficult for me to read the past statements that he has made in terms of the economic rights that would protect working men and women and not feel that his construction of those particular statutes that are passed to protect the economic interests of working men and women would not be threatened.

I have no further questions. I thank the chair.

Senator KOHL. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Kirkland, one of the questioning areas that I pursued with Judge Thomas involved a bitterly contested dispute with a labor union in New York City, Local 28 trade union. It was a case which arose back in 1964 when the New York Human Relations Commission complained about discriminatory practices in hiring with the union. They went through a series of court tests with the district court, finding the union discriminating and then in contempt and being upheld by the court of appeals, and more contempt citations, and finally more than 20 years later, getting to the U.S. Supreme Court. The EEOC during the period of chairmanship of Judge Thomas came in on behalf of the union in that case, and the record is not clear whether that was the solicitor's view or whether it was the view of the commission. But EEOC came in on behalf of the union, contending that there ought not to be a remedy which would correct discrimination other than against the specific individuals who were discriminated against, and it should not be directed to put the class in a position that it would have been but for historical discrimination.

I don't want to get involved in too many hyper-technicalities, and I don't—

Mr. KIRKLAND. I understand the principle that you are addressing, Senator Specter.

Senator SPECTER. Excuse me?

Mr. KIRKLAND. I understand the principle that you are talking about and the issue.

Senator SPECTER. I would be interested in your view as to whether Judge Thomas was right or wrong in that case when he sided with Local 28 of the building trades union in New York.

Mr. KIRKLAND. In my view, he was wrong, sir. And this goes to a very basic proposition. I think the AFL-CIO can fairly claim a considerable share of the authorship of title VII of the Civil Rights Act. In fact, in 1963, I have a rather vivid memory of going to the White House. I was then assistant to George Meany, and he was out of the country, and he called from abroad and said he had had a call and that I should go over, together with our legislative director, who at that time was Andrew Behmiller.

The civil rights law was in the process of being drafted, and it was before it was passed by the Congress. President Kennedy at that time was concerned that the balance in the Congress was so narrow that to incorporate title VII in it at that stage might have doomed the legislation.

The AFL-CIO, the trade union movement, supported Title VII very strongly. We worked very closely with the NAACP, and I recall with Clarence Mitchell particularly, in drafting it and in putting it together, and we insisted on its inclusion, over some considerable countervailing pressures. It was subsequently enacted—because of the change in climate, I think it was problematical whether it could have passed in 1963—it was enacted, and the emotions of the time following the assassination of President Kennedy I think was a major component of it. But that was the key guts part of that Civil Rights Act, and it was the insistence of the AFL-CIO and of its leadership at that time that that provision should apply with equal force to both trade unions and to employers; that trade unions actually needed the support of that legislation, being democratic bodies, to help them take the right position in support of comprehensive efforts to eliminate employment discrimination.

That is our history. It is an established fact. And that is our position today.

Now, this debate as to whether that act as tendered was only to apply to ex post factor acts of discrimination against particular individuals, or whether it contemplates and supports and calls for more comprehensive acts both to assure against continued discrimination in the future or to remedy past discrimination, is a very central issue, and it applies not only to the Civil Rights Act and to employment discrimination but against one's vision of society and one's attitude toward the role of Government and of efforts to cure basic lingering social problems generally.

There are many, many people in this world who are very kind and forthcoming and passionate about the problems of individuals, particular individuals, but who take a wholly different view when the subject is measured to address the problems of masses of

individuals or individuals as a class where they may be totally resistant and in opposition to that.

It is our strong view that these wholesale problems must be addressed in a wholesale way and not in a retail way, one by one. If it is done one by one, singly, after proven particularized cases of abuse have happened, and the remedy addresses only that case, no social problem will ever be competently addressed. And that applies to a whole range of issues, including all relations between the labor and management and the contest or the frequent tension between what is called property rights and individual workers' rights and human rights.

I don't know if I have answered it satisfactorily, sir, but that is my very strong view on it.

Senator SPECTER. I think you have answered it eloquently, Mr. Kirkland. I take it you are not only against Judge Thomas but against Local 28 in that particular circumstance.

Let me wrap up with one question which has quite a number of components—

Mr. KIRKLAND. And I trust that our learned counsel did not appear as a part in that case.

Mr. GOLD. No.

Senator SPECTER. Let me ask you one other question—and I can only ask the question and then leave, Mr. Kirkland, because we have about 4 minutes left in this 15-minute rollcall vote, but I will study your answer with care in the transcript.

You have been very emphatic in your statement that you oppose Judge Thomas and the efforts to put "nine persons who have the virtual power by interpretation to rewrite the Constitution for our times, the unchallenged preserve of a narrow and privileged segment of American opinion". My question to you—and this is more than one, but as I said, I'm going to have to wrap it up because we have to go vote—is how important is it in your view to have an African-American on the court? Others have testified, African-Americans have, that they prefer to have someone not African-American advancing their values as opposed to having someone who is African-American. But how important is it to have an African-American in your opinion on the court in the context of whether a replacement will do better than carry on the ideas which you disagree with as an appointee of this President?

Mr. KIRKLAND. Senator, I would be delighted if the Supreme Court were broadly representative of the entire spectrum of American society. I think it is rather outrageous that over so many years, there has been no representative of the black community on the Supreme Court, and then only one; and then that he should be replaced by a person whose views are so diametrically opposed, I believe, to the measures that have been designed in this country to address the problems of the afflicted and the underprivileged, and who has elected to align himself with the forces of privilege and of power in this country.

I believe that consideration overrides the question of ethnic representation. I would be delighted and I would support a Court made up of five, six, seven, eight or nine black Americans drawn from what is now a considerable body of distinguished jurists who are black and who represent within their views the spectrum of

opinion in society and who embody the possibility that those views, affecting everyone, of every race, creed, color and previous condition of servitude, are adequately and thoroughly debated.

Now, I firmly believe that the forces on that court whose decisions on issue after issue, and in controversy after controversy, are absolutely predictable and are becoming more predictable, I am quite confident, regrettably, that if Judge Thomas is appointed to that Supreme Court that he will join that group whose anticipated positions on these issues will be highly predictable. And I do not think that is good for the country or for the court.

Senator SPECTER. Thank you, Mr. Kirkland.

Thank you, Mr. Chairman.

Senator Heflin [presiding]. I have taken over as presiding officer due to the fact that there is a vote on the floor of the Senate and others have gone. I went and voted early and got back.

As I understand it, there are a group of Congressmen who are here that Chairman Biden wants to accommodate because they have duties in the House of Representatives. But he wants to be here when they start, and he should be back momentarily, in the next minute or 2, but since I have been requested to do it, I will declare about a 3- to 4-minute recess at this time, and we'll resume very shortly and proceed with the congressional group from the House of Representatives.

Thank you, Mr. Kirkland, for your testimony.

Mr. KIRKLAND. Thank you, Mr. Chairman.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator HEFLIN. Mr. Chairman, Attorney General Jimmy Evans, Attorney General of Alabama, was scheduled to be a witness, but was unable to be here, and I ask that his remarks be placed in the record.

The CHAIRMAN. Without objection, they will be placed in the record.

[The prepared statement of Mr. Evans follows:]

# OFFICE OF THE ATTORNEY GENERAL



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STATEMENT OF ALABAMA  
ATTORNEY GENERAL JIMMY EVANS  
BEFORE THE UNITED STATES COMMITTEE  
ON THE JUDICIARY

Mr. Chairman and members of the Judiciary Committee, I am honored to be submitting this statement to you. I am especially honored to be submitting a statement to a committee whose membership includes the distinguished senior Senator from Alabama, who is a former Chief Justice of the Alabama Supreme Court and who has served my state and our country so well for so many years.

Let me begin by saying that the confirmation of Judge Clarence Thomas should not be a partisan political issue. I am a lifelong Democrat and a former member of the Alabama Democratic Executive Committee. I was elected to my present office after defeating a Republican, who is now Chairman of the Alabama Republican Party, in the general election last year. I am a Democrat in every sense of the word, but there are some things that are too important for partisan politics, and the confirmation of Judge Thomas is one of those.

As chief law enforcement officer for the State of Alabama, I know that there is no greater problem facing America today than the problem of violent crime. Judge Thomas understands that. In his earlier public statements he has said that the number one priority in our inner cities ought to be controlling crime, and he is absolutely right. It used to be that in many of our cities it was not safe to be on the streets at night. Now, it is becoming unsafe to be on those streets even in broad daylight.

Judge Thomas has also previously spoken publicly of the totalitarianism of criminals and how crime robs us of our freedoms. Again, he is absolutely right. Much has been said in these hearings, and rightfully so, about the cherished freedoms that are ours as Americans to enjoy. However, we should never forget that a murder victim has no freedom, and a rape victim is condemned to living under the tyranny of fear. An essay on freedom rings hollow to a mother, living in a housing project, whose children have to dodge stray bullets on the playground. One of the most important civil rights is the right to be free from fear in our homes, in our streets, and in our schools and places of worship. Millions of Americans are being denied that civil right.

In the face of all of this, a national association of special interest attorneys, who represent criminals, has criticized Judge Thomas because they say his opinions show a "cold indifference." I can assure you that the last thing we

need on the Supreme Court is a judge who has warm and sensitive feelings toward drug traffickers, murderers, and rapists. I know from reviewing Judge Thomas' opinions and from his public comments that he is sensitive to the interests of law enforcement and to the rights of the victims of crime. He is fair and unbiased, and we need him on the Supreme Court.

This opinion is not just my opinion. It is the view of the law enforcement community in America. Let me give you some examples from my state. Judge Thomas has been endorsed by the Alabama District Attorneys Association, by the Alabama Sheriffs Association, by the Alabama State Troopers Association, by the Alabama State Lodge of the Fraternal Order of Police, and by the Metropolitan Criminal Justice Executive Association. He has also been endorsed by twelve Alabama black community leaders in the law enforcement area, whose number includes state and federal law enforcement officials.

Mrs. Miriam Shehane is the President of Victims of Crime and Leniency, or V.O.C.A.L., which is Alabama's largest victims' rights organization. In her letter endorsing Judge Thomas, Mrs. Shehane pointed out something that I was reminded of when I came into this building today. She pointed out that those who work in this building are protected by metal detectors and guards. As Senators, you also enjoy under federal law special protection from violent attacks upon you. If you are the victim of violence, all the force of the federal government will be brought to bear in apprehending and

punishing the criminal. Mrs. Shehane said that was as it should be, and I agree. We want you to be safe.

However, as she pointed out, there are millions of Americans who do not have the special protection that you enjoy. They are dependent upon the criminal justice system for their protection. What they need is a judiciary that will be as concerned with protecting the lives and interests of innocent citizens as it is with protecting those of criminals. The confirmation of Judge Thomas will be an important step in the right direction. On behalf of law enforcement, and on behalf of the law-abiding citizens of Alabama and of the entire country, I urge you to vote to confirm Judge Thomas.

The CHAIRMAN. Well, I say to our colleagues from the other body, welcome. Maybe it is more often from your perspective than you would like to think that you have had to come over here and sit around and just wait, and I appreciate it very much. I hope my colleagues understand that we have not been able to, with great precision, indicate when any one panel would be up.

And I want to thank my Republican friends on the committee because we have been going back and forth, a pro panel, a negative panel, a pro again, et cetera. But understanding the incredible constraints on the time of each of our five colleagues from the House side, our Republican friends have agreed to take out of order in the sense that we would have two pro panels in a row.

And we have a genuine array of talent, and also of power on the House side. It is not often we get you before us like this to have all of you there. We are going to keep you 5 or 6 hours, ask you a lot of questions about things that don't have anything to do with this nomination, and I am going to put Conyers under oath and make sure we find out what we do on some of this stuff. He is the toughest ally and toughest opponent on the Judiciary Committee. I know it is not going anywhere unless I get his agreement before it goes.

But at any rate, testifying are the Honorable John Conyers, Jr., from Detroit, MI, representing the 1st District; the Honorable Louis Stokes from Shaker Heights, OH, representing the 21st District; the Honorable Major Owens from Brooklyn, NY, representing the 12th District of New York; the Honorable Craig A. Washington from Houston, TX, representing the 18th District; and the Honorable John Lewis from Atlanta, GA, representing Georgia's 5th District.

Gentlemen, we are indeed honored to have you here and we know how difficult it is for your time because you have equally as many calls upon your time as any member of this committee. Obviously, it is important to you or you wouldn't be here.

Let me yield to the panel and suggest however you all would like to begin, it is up to you. Do you have any preferred order of who would go first?

Mr. CONYERS. No.

The CHAIRMAN. All right. Congressman Conyers, welcome, and we are anxious to hear what you have to say.

**STATEMENTS OF A PANEL CONSISTING OF HON. JOHN CONYERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN; HON. LOUIS STOKES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO; HON. MAJOR OWENS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK; HON. CRAIG WASHINGTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS; AND HON. JOHN LEWIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, ON BEHALF OF THE CONGRESSIONAL BLACK CAUCUS**

Mr. CONYERS. Thank you very much, Chairman Biden. It is a pleasure and honor for us to appear here today. We represent here, with myself and Louis Stokes and Major Owens, Craig Washington and John Lewis, the Congressional Black Caucus, which was estab-

lished 21 years ago to protect and advance the interests of African-Americans here in Congress.

We have been democratically chosen to represent the views of our constituents for quite a number of years. We chair 5 full committees and 13 subcommittees, and we come here today as a group sorry to report that our assessment of Judge Thomas' stewardship of key agencies administering civil rights laws is that he has flunked the test.

The record is clear. While at EEOC, the Equal Employment Opportunity Commission, Judge Thomas was, in fact, a lawless administrator, failing to enforce civil rights laws and substituting his own vision for civil rights enforcement. This has been documented in his extraordinary 56 appearances before the Congress. Most of these appearances were controversial, and much of the record expressed exasperation of members of House committees with his administration of the law, as documented in the several General Accounting Office reports on his stewardship.

There are several major issues. One is the issue of credibility, and let me get straight to the point. You are confronted with the dilemma of the enigma of Clarence Thomas. Is he the pugnacious conservative who didn't hesitate to espouse his hostility to traditional civil rights remedies, his support for natural law, his opposition to abortion, his contempt for Congress? Or he is really the moderate trying to get confirmed to the Supreme Court who is retreating from virtually every controversial statement that he has ever made?

It is an important issue, this one of credibility. He couldn't remember personally ever engaging in a discussion about *Roe v. Wade* since 1972. However, in 1987, in a news article in the Chicago Defender, Judge Thomas stated that there was a tremendous overlap of the conservative Republican agenda and black beliefs on abortion, however incorrect that statement may be.

In the 1989 Harvard Journal of Law on Public Policy, in a critique of judicial activism he wrote that the current case provoking the most protest from conservatives is *Roe v. Wade*. Is it credible, then, to believe that he has never discussed this case?

On the issue of the South Africa connection, he told the committee that he was not aware of the representation of South Africa by Mr. Jay Parker, a friend whom he has described as a mentor or hero. But Newsday has reported that in an EEOC staff meeting in 1986, Judge Thomas entered the meeting with a newspaper outlining Parker's relationship with South Africa and discussed for 45 minutes the representation of South Africa by Parker.

In 1987, again, according to the Foreign Agents Registration Act, Judge Thomas attended a dinner for the South African ambassador arranged by Mr. Parker's agency to permit the Ambassador to influence Judge Thomas and other black officials. If Parker was at the dinner, the act requires that Parker inform Thomas that Parker was a paid agent, and I think this issue deserves quite a bit more attention.

There is the whole question of stonewalling before this committee. We have the additional issue of the attack on equal employment opportunity and affirmative action. We are dealing here with a nominee who has literally no private legal experience. He has

only 18 months on the bench, and the most that we have from his record is about 9 years in the executive branch. We ask that our statement be incorporated and reproduced fully into the record.

The CHAIRMAN. Without objection, it will be.

Mr. CONYERS. Thank you. We go to the heart of this matter of his resistance not only before the congressional committees, but even before courts where he was brought for noncompliance. The General Accounting Office has documented very critically many of the acts that he has committed that resist the implementation of law and lead us to conclude that we might not be safe with him as a guardian of those laws that seek enforcement derived from the Constitution.

I close on this point, many have dwelled on the fact that he is an African-American nominee. I would like to point out to you that if, contrary to the views of the Congressional Black Caucus, the Progressive Baptist Church organization, the Convention of Baptist Organizations, the NAACP, State black caucuses of elected officials, the labor movement which includes many African-American leaders—if he were to go on the bench, it is unlikely that any administration within our lifetime would appoint another African-American jurist to this high post.

And so we come here to ask you to apply the same standards that we had to apply. This debate has elevated the critical evaluation of blacks in America about how we choose to support our leaders, and it seems to me that we have made this decision without reference to his race. We come to this conclusion independently, and we urge, as a result of our examination of the record, our experiences with him as members of Congress, that you very definitely reject the nomination of Judge Clarence Thomas.

Thank you very much for this opportunity.

[The prepared statement of Mr. Conyers follows:]

Office of

## CONGRESSMAN JOHN CONYERS, JR.

First District, Michigan

FOR RELEASE  
1:00 PM, SEPTEMBER 19, 1991

FOR MORE INFORMATION CONTACT:  
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**STATEMENT OF THE HONORABLE JOHN CONYERS, JR.  
SENIOR MEMBER, CONGRESSIONAL BLACK CAUCUS  
ON THE NOMINATION OF JUDGE CLARENCE THOMAS  
AS ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT**

The Congressional Black Caucus was established twenty-one years ago to protect and advance the interests of African Americans here in Congress. We have been democratically chosen to represent the views of African Americans themselves. As Members of the House we are highly sensitive to the views of our constituents, who get unusually frequent opportunities to inform us of their opinions.

Our members include the chairs of five full committees and the chairs of thirteen subcommittees. We have exercised close oversight over the implementation of civil rights laws. I am sorry to report that our assessment of Judge Thomas's stewardship of key agencies administering these laws, is that Judge Thomas has flunked the test.

The record is clear, while at EEOC Judge Thomas was a lawless administrator, failing to enforce civil rights laws, and substituting his own vision of civil rights enforcement. This has been documented in his extraordinary 56 appearances before Congress. Most of these appearances were controversial and much of the record expressed exasperation of the members of House Committees with his administration of the law, as documented by several GAO reports on his stewardship.

**THE CASE OF THE TWO CLARENCE'S: AN ISSUE OF CREDIBILITY**

Let me get straight to the point. The members of this committee are confronted with a dilemma. Clarence Thomas is an enigma. Is he the pugnaconservative who did not hesitate to espouse his hostility to traditional civil rights remedies, his support for natural law, opposition to abortion and his contempt for Congress? Or is he really the moderate trying to get confirmed to the Supreme Court, who is retreating from virtually every controversial statement he ever made? It is an important issue of credibility.

Clarence Thomas testified that "I cannot remember personally engaging" in any discussion about Roe v. Wade and "I do not have a personal opinion on the outcome in Roe v. Wade." However, in 1987 in the Chicago Defender, Judge Thomas stated that there was "tremendous overlap of the conservative Republican agenda and Black beliefs on abortion". In the 1989 Harvard Journal of Law and Public Policy in a critique of so-called judicial activism, Clarence Thomas wrote that "the current case provoking the most protest from conservatives is Roe v. Wade." Is it credible to believe then that Clarence Thomas never discussed Roe v. Wade?

MORE

Concerning the Griggs decision, Thomas declared: "We have permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as adverse impact."

These are not the comments of a reasoned jurist who happens to have a different point of view on affirmative action. They are the comments of a man whose imprudent remarks could destroy the delicate fabric of racial tolerance we have carefully developed in the country.

#### **ATTACK ON THE VOTING RIGHTS ACT**

Clarence Thomas has demonstrated a hostility to the one law which is most responsible for most members of the Congressional Black Caucus, the Voting Rights Act.

Judge Thomas in a fundamental misunderstanding of the law attacked the Voting Rights Act in a speech at the Tocqueville Forum in April 18, 1988, saying:

"Many of the Court's decisions in the area of voting rights have presupposed that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs."

This is simply untrue. As members of this committee know our intent was that the burden is on the plaintiff to demonstrate racial bloc voting does occur, as several cases, most notably Thornburg v. Gingles, have affirmed.

He has also criticized the effects test in the Voting Rights Act as unacceptable. This test has formed the cornerstone of the Voting Rights Act, and is largely responsible for the increase in the number of black elected officials around the country.

#### **FAILURE TO ENFORCE THE LAW AT EEOC**

This committee is aware that while Clarence Thomas was chairman of the EEOC over 13,000 age discrimination cases were not investigated within the two year statute of limitations period. As a result, older workers lost their right to pursue their claims in court. I would like to briefly talk about one important episode on this issue since it was investigated by one of the subcommittees of the House Government Operations Committee which I chair.

The head of the St. Louis EEOC office, Lynn Bruner, commented publicly in 1988 that EEOC's failure to investigate age discrimination cases was wide spread, thus allowing these cases to lapse in every EEOC district office.

Ms. Bruner was asked to testify on this issue before the Senate Special Committee on Aging. The night before her testimony, she received a negative performance rating, the first one in her career, and was specifically criticized for making comments to the press which "present Chairman Thomas in a negative light."

Despite this evaluation, Ms. Bruner testified on June 23, 1988 that she had repeatedly alerted EEOC headquarters to the urgent problem of age discrimination charges not being investigated, however, EEOC under Clarence Thomas failed to act. Four days after this testimony, Ms. Bruner was visited by Polly Meade, the Director of Performance Services from EEOC headquarters in Washington, who reported directly to Judge Thomas. According to Ms. Bruner, Ms. Meade spoke disparagingly of her Senate testimony, stated that she was in trouble and intimated that Ms. Bruner would not be in her job much longer.

It was not until two months later, when Judge Thomas was about to be nominated for the Court of Appeals for the District of Columbia, that he phoned one of my subcommittees indicating that he had changed his mind and would withdraw the negative evaluation.

MORE

On the issue of South Africa, he told this committee, "I was not aware, again, of the representation of South Africa itself by Jay Parker." However, Newsday has reported that at an EEOC staff meeting in 1986, Clarence Thomas entered the meeting with a newspaper article outlining Parker's relationship with South Africa, and discussed for 45 minutes the representation of South Africa by Parker, according to former Thomas aides. In 1987, according to Foreign Agents Registration Act records, Thomas attended a dinner for the South African ambassador arranged by Jay Parker, apparently to lobby the South African ambassador.

I am not here to suggest that Clarence Thomas was personally involved in representing South Africa. However, it is beyond belief that he was unaware that his close friend and mentor Jay Parker was representing South Africa. What did he think he was doing dining with the South African ambassador? Just shooting the breeze? These are important issues of credibility.

None of us knows which Clarence Thomas we will get on the Supreme Court. But the stakes are too high for the committee to roll the dice when the lives of all racial minorities in this country hang in the balance. If, as his view suggest, he continues to oppose class action law suits, affirmative action, Roe v. Wade, and the Voting Rights Act, nothing can be done once he is on the Court for life. Now is the only time to act.

#### Stonewalling Members of the Senate Judiciary Committee

Clarence Thomas's selective stonewalling of this Committee threatens to undermine the integrity of the confirmation process. Clarence Thomas says it would be inappropriate for him to discuss a range of issues, including abortion because these issues may come before the Court one day.

On the other hand, he has freely offered that he has no philosophical objections to school prayer and the death penalty. He cannot have it both ways.

If Judge Thomas is permitted to decide for himself which issues he will address and which issues he will not, then the confirmation process becomes merely window dressing for the politically popular views of the present administration. In addition, every other nominee from this day forward will do exactly the same thing.

#### ATTACK ON EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

Judge Thomas refuses to recognize that civil rights is now a systemic problem that requires systemic solutions like affirmative action. Yet, the most disturbing aspect of Judge Thomas's opposition to affirmative action is that he has challenged the Constitutional authority and the integrity of the Congress to even consider affirmative action and other solutions to remedying the widespread discrimination that continues to exist in this country.

In the Fullilove decision, upholding Congress's effort to provide a remedy for the longstanding exclusion of minorities from opportunities to become government contractors, Thomas said: "Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside law the Court upheld in Fullilove v. Klutznick."

Regarding affirmative action generally, Thomas stated: "It is just as insane for blacks to expect relief from the Federal government for years of discrimination as it is to expect a sagger to nurse his victims back to health. Ultimately, the burden of being sugged falls on you."

MORE

The Senate Special Committee on Aging Report found that:  
"The EEOC misled the Congress and the public on the extent to which ADEA charges had been permitted to exceed the statute of limitations."

Senator Pryor, the current Chairman of the Committee, made it clear that the misrepresentations were those of Clarence Thomas, by stating, "I was dismayed to learn about several erroneous statements made by Chairman Thomas...Those statements are certainly misleading..."

Judge Thomas's actions at EEOC illustrate his lack of commitment to First Amendment, to protecting whistleblowers, to protecting victims of age discrimination, and enforcing our equal opportunity laws. The conclusion that we are compelled to reach is that Judge Thomas has failed to carry out the constitutional obligation of members of the Executive Branch to "take care that the laws are faithfully executed" and that he exhibited a pervasive disrespect for Congress and the legislative process.

Finally, let me say that Clarence Thomas's past record and his stated views are threats to the best interests of African Americans. We do not oppose Judge Thomas for any other reason than his record. I opposed Judges Haynsworth, Carswell, Bork, and Kennedy -- not because of their race, but because they espoused a judicial philosophy which if implemented would reverse civil rights progress we have made in this country over the last three decades.

Similarly, you should not support a nominee merely because they are black. The issue is not race but merit. On the merits, Thomas should be rejected.

JC-102-001-009

G:THOMAS.PR

The CHAIRMAN. Thank you very much.  
Congressman Stokes.

#### STATEMENT OF HON. LOUIS STOKES

Mr. STOKES. Mr. Chairman and members of the committee, I also deem it a pleasure and an honor to appear before you this afternoon.

Our appearance here today, while born in necessity, is also born in pain. When Judge Thomas shared with you the touching experience of his boyhood in Pin Point, GA, he evoked in each of us the memory of similar boyhoods in our own families.

While we were not born in Pin Point, we share with him the like and similar circumstances of ill-housing, poverty, mothers who were maids, and grandparents without whom we or our mothers could not have made it.

Not just Judge Thomas and members of the Congressional Black Caucus have shared this common experience. A majority of black Americans who have achieved in this society have shared both the poverty, segregation and the racial indignities which emotionally overcame Judge Thomas when he testified.

The difference between Judge Thomas and most black Americans who have achieved, in spite of poverty, adversity, and racism, is that most of them have not forgotten from whence they have come. Whenever possible, they have used their educations and positions of achievement to help eliminate from our society these barriers to equal opportunity, liberty, and justice. It is almost unheard of to see them utilize their educations and positions to impede the progress of those less fortunate than they.

When Justice Thurgood Marshall retired, Chairman Biden was quoted as saying, and I quote,

The Supreme Court has lost a historic Justice, a hero for all time. I hope the President will nominate a replacement who is worthy of this great man's place in the Court and in our hearts.

As African-Americans, we not only wanted to see another worthy person replace him; we wanted to see another qualified black American replace him. Justice Thurgood Marshall is a legend in America. As the NAACP's top lawyer, he traveled the length and breadth of this Nation, winning hundreds of civil rights victories in one courtroom after another.

He was America's greatest constitutional lawyer, having won 29 of 32 cases he argued in the U.S. Supreme Court. Each case he won whittled away at some barrier to equality and justice confronting African-Americans. As NAACP lawyer, solicitor general, judge of the court of appeals, and Supreme Court Justice, Thurgood Marshall became a giant in American law.

I said to you earlier that our appearance here, while born in necessity, is also born in pain. We are pained because as much as we would like to see the diversity that another black American would bring to the Court, Judge Thomas is not the man.

Our opposition to Judge Thomas does not derive from his being in a different political party. Indeed, we expect the President to nominate a person from his own party. In fact, a well-respected Republican, Gary Franks, is a member of the Congressional Black Caucus.

We do not believe or expect that ideological conformity or strategic agreement is required of African-Americans in public service. What is required in our fight for justice is a demonstrated commitment to the broad, bipartisan approaches that have been adopted by Republicans, Democrats, blacks, whites, Hispanics, women, and many others alike.

The record of Judge Thomas shows a firm and consistent opposition to many of those things our people need most urgently. We cannot ignore or excuse Clarence Thomas' record, views, and values merely because he is an African-American. His view of constitutional rights, as he has articulated them as jurist, administrator and before the nation's press, are inconsistent with the interests of the people we serve.

Americans, in general, cannot afford to invest their future in the hope that Clarence Thomas will change once he sits on the Supreme Court. We would not be credible if we had a standard built upon the race of the nominee. We believe that the same standard must be applied to Thomas that we applied to Robert Bork when we opposed his nomination.

As Members of Congress, we know Judge Thomas and we know his record. He has testified before congressional committees more than 50 times. Most of his appearances were controversial and much of it expressed the exasperation of House committees with his administration of the law.

How Judge Thomas has viewed his legal responsibilities in the past is the best evidence of how he would perform as a Supreme Court Justice. The conclusion we have reached is that Judge Thomas failed over that period of time to carry out the constitutional obligation of members of the executive branch to take care that the laws are faithfully executed and that he exhibited a pervasive disrespect for Congress and for the legislative process.

Our conclusion, which is amply supported by the evidence, is that his 9 years in the executive branch is almost all of the experience that Clarence Thomas has to offer in support of the proposition that he is qualified to sit on the Supreme Court. Far from assisting his candidacy, the performance of Judge Thomas as a Federal official provides powerful reasons why he should not be confirmed.

In asking you to reject his nomination, we must ask you to hold President Bush to the same standard demonstrated by President Lyndon Banes Johnson, who, when the time came for a black appointee to the Court, nominated the best constitutional lawyer in America. Moreover, his nominee had a demonstrated commitment to the values of this Nation in protecting the less fortunate in our society. Judge Thomas does not meet this criteria.

I thank you.

[The prepared statement of Mr. Stokes follows:]

REMARKS OF

THE HONORABLE LOUIS STOKES (D-OH)

BEFORE THE

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
CONFIRMATION HEARINGS ON JUDGE CLARENCE THOMAS

SEPTEMBER 19, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. I ALSO DEEM IT  
A PLEASURE TO APPEAR BEFORE YOU THIS AFTERNOON. OUR APPEARANCE  
HERE TODAY, WHILE BORNE IN NECESSITY, IS ALSO BORNE IN PAIN.

WHEN JUDGE THOMAS SHARED WITH YOU THE TOUCHING EXPERIENCE  
OF HIS BOYHOOD IN PINPOINT, GEORGIA, HE EVOKED IN EACH OF US THE  
MEMORY OF SIMILAR BOYHOODS IN OUR OWN FAMILIES. WHILE WE  
WEREN'T BORN IN PINPOINT, WE SHARE WITH HIM THE LIKE AND SIMILAR  
CIRCUMSTANCES OF ILL HOUSING, POVERTY, MOTHERS WHO WERE MAIDS,  
AND GRANDPARENTS WITHOUT WHOM WE AND OUR MOTHERS COULD NOT HAVE  
MADE IT.

NOT JUST JUDGE THOMAS AND MEMBERS OF THE CONGRESSIONAL  
BLACK CAUCUS HAVE SHARED THIS COMMON EXPERIENCE. THE MAJORITY  
OF BLACK AMERICANS WHO HAVE ACHIEVED IN THIS SOCIETY HAVE SHARED

BOTH THE POVERTY, SEGREGATION AND THE RACIAL INDIGNITIES WHICH EMOTIONALLY OVERCAME JUDGE THOMAS WHEN HE TESTIFIED. THE DIFFERENCE BETWEEN JUDGE THOMAS AND MOST BLACK AMERICANS WHO HAVE ACHIEVED IN SPITE OF POVERTY, ADVERSITY AND RACISM IS THAT MOST OF THEM HAVE NOT FORGOTTEN FROM WHENCE THEY HAVE COME.

WHENEVER POSSIBLE, THEY HAVE USED THEIR EDUCATIONS AND POSITIONS OF ACHIEVEMENT TO HELP ELIMINATE FROM OUR SOCIETY THESE BARRIERS TO EQUAL OPPORTUNITY, LIBERTY AND JUSTICE. IT IS ALMOST UNHEARD OF TO SEE THEM UTILIZE THEIR EDUCATIONS AND POSITIONS TO IMPEDE THE PROGRESS OF THOSE LESS FORTUNATE THAN THEY.

WHEN JUSTICE THURGOOD MARSHALL RETIRED, SENATOR BIDEN WAS QUOTED AS SAYING, "THE SUPREME COURT HAS LOST A HISTORIC

JUSTICE -- A HERO FOR ALL TIMES. I HOPE THE PRESIDENT WILL  
NOMINATE A REPLACEMENT WHO IS WORTHY OF THIS GREAT MAN'S PLACE  
IN THE COURT AND IN OUR HEARTS."

AS AFRICAN AMERICANS WE NOT ONLY WANTED TO SEE ANOTHER  
WORTHY PERSON REPLACE HIM, WE WANTED TO SEE ANOTHER QUALIFIED  
BLACK AMERICAN REPLACE HIM. JUSTICE THURGOOD MARSHALL IS A  
LEGEND IN AMERICA. AS THE NAACP'S TOP LAWYER, HE TRAVELLED THE  
LENGTH AND BREADTH OF THIS NATION WINNING HUNDREDS OF CIVIL  
RIGHTS VICTORIES IN ONE COURTROOM AFTER ANOTHER.

HE WAS AMERICA'S GREATEST CONSTITUTIONAL LAWYER, HAVING  
WON 29 OF THE 32 CASES HE ARGUED IN THE UNITED STATES SUPREME  
COURT. EACH CASE HE WON WHITTLED AWAY AT SOME BARRIER TO  
EQUALITY AND JUSTICE CONFRONTING AFRICAN AMERICANS. AS NAACP

LAWYER, SOLICITOR GENERAL, JUDGE OF THE COURT OF APPEALS, AND SUPREME COURT JUSTICE, THURGOOD MARSHALL BECAME A GIANT IN AMERICAN LAW.

I SAID TO YOU EARLIER THAT OUR APPEARANCE HERE, WHILE BORNE IN NECESSITY, IS ALSO BORNE IN PAIN. WE ARE PAINED BECAUSE AS MUCH AS WE WOULD LIKE TO SEE THE DIVERSITY THAT ANOTHER BLACK AMERICAN WOULD BRING TO THE COURT, JUDGE THOMAS IS NOT THE MAN.

OUR OPPOSITION TO JUDGE THOMAS IS NOT DERIVED FROM HIS BEING IN A DIFFERENT POLITICAL PARTY. INDEED, WE EXPECT THE PRESIDENT TO NOMINATE A PERSON FROM HIS OWN PARTY. IN FACT, A WELL RESPECTED REPUBLICAN, GARY FRANKS, IS A MEMBER OF THE CONGRESSIONAL BLACK CAUCUS.

WE DO NOT BELIEVE OR EXPECT THAT IDEOLOGICAL CONFORMITY OR

STRATEGIC AGREEMENT IS REQUIRED OF AFRICAN AMERICANS IN PUBLIC SERVICE.

WHAT IS REQUIRED IN OUR FIGHT FOR JUSTICE IS A DEMONSTRATED COMMITMENT TO THE BROAD BI-PARTISAN APPROACHES THAT HAVE BEEN ADOPTED BY REPUBLICANS, DEMOCRATS, BLACKS, WHITES, HISPANICS, WOMEN AND MANY OTHERS ALIKE.

THE RECORD OF JUDGE THOMAS SHOWS HIS FIRM AND CONSISTENT OPPOSITION TO MANY OF THOSE THINGS OUR PEOPLE NEED MOST URGENTLY. WE CANNOT IGNORE OR EXCUSE CLARENCE THOMAS' RECORD, VIEWS, AND VALUES MERELY BECAUSE HE IS AN AFRICAN AMERICAN.

HIS VIEW OF CONSTITUTIONAL RIGHTS AS HE HAS ARTICULATED THEM AS JURIST, ADMINISTRATOR AND BEFORE THE NATION'S PRESS ARE INCONSISTENT WITH THE INTERESTS OF THE PEOPLE WE SERVE.

AMERICANS IN GENERAL CANNOT AFFORD TO INVEST THEIR FUTURE IN THE HOPE THAT CLARENCE THOMAS WILL CHANGE ONCE HE SITS ON THE SUPREME COURT.

WE WOULD NOT BE CREDIBLE IF WE HAD A STANDARD BUILT UPON THE RACE OF THE NOMINEE. WE BELIEVE THAT THE SAME STANDARD MUST BE APPLIED TO THOMAS THAT WE APPLIED TO ROBERT BORK WHEN WE OPPOSED HIS NOMINATION.

AS MEMBERS OF CONGRESS, WE KNOW JUDGE THOMAS AND WE KNOW HIS RECORD. HE HAS TESTIFIED BEFORE CONGRESSIONAL COMMITTEES MORE THAN 50 TIMES. MOST OF HIS APPEARANCES WERE CONTROVERSIAL AND MUCH OF IT EXPRESSED THE EXASPERATION OF HOUSE COMMITTEES WITH HIS ADMINISTRATION OF THE LAW. HOW JUDGE THOMAS HAS VIEWED HIS LEGAL RESPONSIBILITIES IN THE PAST IS THE BEST EVIDENCE OF

HOW HE WOULD PERFORM AS A SUPREME COURT JUSTICE.

THE CONCLUSION THAT WE HAVE REACHED IS THAT JUDGE THOMAS FAILED OVER THAT PERIOD OF TIME TO CARRY OUT THE CONSTITUTIONAL OBLIGATION OF MEMBERS OF THE EXECUTIVE BRANCH TO "TAKE CARE THAT THE LAWS ARE FAITHFULLY EXECUTED" AND THAT HE EXHIBITED A PERVASIVE DISRESPECT FOR CONGRESS AND FOR THE LEGISLATIVE PROCESS.

OUR CONCLUSION, WHICH IS AMPLY SUPPORTED BY THE EVIDENCE, IS THAT HIS NINE YEARS IN THE EXECUTIVE BRANCH IS ALMOST ALL OF THE EXPERIENCE THAT CLARENCE THOMAS HAS TO OFFER IN SUPPORT OF THE PROPOSITION THAT HE IS QUALIFIED TO SERVE ON THE SUPREME COURT. FAR FROM ASSISTING HIS CANDIDACY, THE PERFORMANCE OF JUDGE THOMAS AS A FEDERAL OFFICIAL PROVIDES POWERFUL REASONS WHY

HE SHOULD NOT BE CONFIRMED.

IN ASKING YOU TO REJECT HIS NOMINATION, WE MUST ASK YOU TO  
HOLD PRESIDENT BUSH TO THE SAME STANDARD DEMONSTRATED BY  
PRESIDENT LYNDON B. JOHNSON WHO WHEN TIME CAME FOR A BLACK  
APPOINTEE TO THE COURT NOMINATED THE BEST CONSTITUTIONAL LAWYER  
IN AMERICA. MOREOVER, HIS NOMINEE HAD A DEMONSTRATED COMMITMENT  
TO THE VALUES OF THIS NATION IN PROTECTING THE LESS FORTUNATE IN  
OUR SOCIETY. JUDGE THOMAS DOES NOT MEET THIS CRITERIA.

The CHAIRMAN. Thank you very much, Congressman.  
Congressman Owens.

#### STATEMENT OF HON. MAJOR OWENS

Mr. OWENS. Mr. Chairman, I also want to thank you for the opportunity to appear before this committee during this set of historic hearings. In the time allotted to me, Mr. Chairman, I want to make two important points. First, Judge Thomas should not be confirmed because as a Federal official of the executive branch of Government, he consistently demonstrated an open contempt for law. For the youth of America and all people of the world who believe in rule by law, Judge Thomas is a monstrous negative role model.

My second point relates to the obligation I feel to communicate to you the deep feelings of my constituents concerning this nominee and the process which led to the placement of his name before this committee.

Judge Clarence Thomas is being rewarded for the loyal and obedient execution of the orders of two Presidents and his political party. In the process of carrying out those orders, Judge Thomas has trampled on certain legal principles which are vital for the survival of our people.

It is important that I place on the record the response of the great majority of African-American people to his behavior and the clever maneuvers of his sponsor, the President.

On the matter of Judge Thomas' contempt for law, let me make it clear that I speak from the experience of direct observation. As a member of the Education and Labor Committee, which has oversight responsibility for the Equal Employment Opportunity Commission, I served on numerous panels which heard testimony from Judge Thomas.

At this point, I would like to state for the record that there is a voluminous set of records of hearings and General Accounting Office reports which comprise a body of evidence too little analyzed or referred to since Judge Thomas was nominated.

Judge Thomas has testified before congressional committees an extraordinary 56 times. This large number of appearances does not simply reflect the judge's long tenure. Very little of Clarence Thomas' congressional oversight testimony was mere reporting or was otherwise routine. Most of it was controversial and much of it expressed the exasperation of House committees with his administration of the law.

In the same vein are 10 GAO reports, an unusual number, and most of them highly critical of the nominee's administration of the laws under his jurisdiction. It is Judge Thomas' actual professional record while serving in the government that should count most to the outcome of these deliberations. How Judge Thomas has viewed his legal responsibilities in the past is the best evidence of how he is likely to discharge them in the future.

The conclusion that we have reached is that Judge Thomas failed over that period of time to carry out the constitutional obligation of members of the executive branch to, quote, "take care that the laws are faithfully executed," end of quote, and that he exhibited a pervasive disrespect for Congress and for the legislative process.

Our conclusion, which is amply supported by the evidence, is all the more damning when it is recognized that his years in the executive branch constitute almost all of the experience that Judge Thomas has to offer in support of the proposition that he is qualified to serve on the Supreme Court.

Far from assisting his candidacy, the performance of Judge Thomas as a Federal official provides powerful reasons why he should not be confirmed. Two years ago, 14 Members of the House of Representatives, including 12 chairs of committees having jurisdiction over the EEOC and 5 members of the Congressional Black Caucus, wrote to President Bush asking that Clarence Thomas not be nominated to the court of appeals.

After reviewing the record, the writers of the letter said that Thomas had, quote, "resisted Congressional oversight and been less than candid with legislators about agency enforcement policies," end of quote. These Members of Congress concluded that Thomas had demonstrated an, quote, "overall disdain of the rule of law."

Time will not permit me to offer more detail on this point. However, pages 4 through 9 of the written statement of the Congressional Black Caucus does provide amplification for this argument.

Like numerous other Reagan administration appointees, Judge Thomas repeatedly displayed great contempt for the law. Although sworn to uphold and implement the law, Judge Thomas repeatedly delayed, sabotaged and blockaded the process of enforcement of the laws entrusted to his administration.

In this pattern of behavior, Judge Thomas was certainly not unique among Reagan administration officials. For 8 years, contempt for the law was part of the style and the strategy of the executive branch of Government. Members of Congress repeatedly encountered this contempt for the law not only in the Equal Employment Opportunity Commission under Judge Thomas, but also in OSHA, EPA, the Department of Justice, and, as the whole world knows, on the National Security Council. Oliver North's separate government in the basement of the White House was the most visible and the most dangerous example of this contempt for law.

What must be recognized, however, by this committee is that the spirit of Oliver North was rampant throughout all of the units of the Reagan administration. As a Member of Congress, I regret very much the helplessness and inability of Congress to curtail and counteract the brazen contempt for law exhibited by so many executives who were sworn to uphold and implement the law. I pray that in the future we will find ways to guarantee that such a widespread hemorrhaging of the integrity of Government will never take place again.

But one giant step to restore respect for law, and thus resuscitate the vital moral authority of our Government, is a step that can be taken immediately by this committee and the Members of the Senate. Let it be clearly stated by this committee and this Senate that a new standard has been established that regardless of the desires of the President to reward the loyal and the obedient, any persons who have, in their public performance at any level of Government, displayed a contempt for the law shall not be sanctioned and confirmed for the Federal judiciary. In other words, the price of obeying orders instead of upholding and implementing the law

should be denial of the privilege of adjudicating and interpreting law.

In addition to his job performance, for example, before the youth of America and the people of the world. The nominee has used what could accurately be labeled as the equivalent of the Fifth Amendment as his run from his own record. What manner of Government are we, to tolerate people in high places who blatantly evade honest questions?

Finally, I would like to briefly convey to you the sentiments of my constituents on this nominee and the nomination process. I represent the 12th Congressional District of New York, which is 90 percent African-American. I have been a public official for more than 23 years, and I know how to read my constituents. The overwhelming reaction to the nomination of Clarence Thomas was one of disbelief and a sense of betrayal, and, among the youth, immediate bitterness.

If you want to truly understand the thoughts and feelings of the overwhelming majority of African-Americans in this country, then try to imagine how the French would have felt, if the collaborator Marshall Petain had been awarded a medal after the liberation of France in World War II, or if in Norway Quisling had been made a high official in the government. Try to put yourself in the place of a soldier in the Continental Army, after Valley Forge and all of the other difficult struggles, try to imagine the feelings of such a soldier, if he was forced to watch a ceremony where Gen. George Washington promoted Benedict Arnold to the level of a general. Imagine the tears in the eyes of those strong men that such an act would have generated.

The masses of black people judge Clarence Thomas as a man who has clearly and consistently stood against those legal principles, philosophies and ideas which are vitally necessary for our survival and continuing progress. The elevation of this man to the Supreme Court would be a gross insult, a cruel slap in the face of all African-Americans.

It is my plea that you and that the Senate should not acquiesce and permit the continuing erosion of the moral foundation of America. The Senate should not acquiesce and participate in the further trivializing of the Supreme Court of our Nation. On the appointment of Judge Clarence Thomas, it is my plea that the vote on confirmation be a clear and decisive no.

Thank you.

[Prepared statement follows:]

**TESTIMONY OF CONGRESSMAN MAJOR OWENS  
BEFORE THE SENATE JUDICIARY COMMITTEE  
REGARDING THE CONFIRMATION OF JUDGE  
CLARENCE THOMAS - SEPTEMBER 19, 1991**

MR. CHAIRMAN, THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE THIS COMMITTEE DURING THIS SET OF HISTORIC HEARINGS FOR THE PURPOSE OF CONSIDERING JUDGE CLARENCE THOMAS FOR APPOINTMENT TO THE UNITED STATES SUPREME COURT.

IN THE TIME ALLOTTED TO ME, MR. CHAIRMAN, I WANT TO MAKE TWO IMPORTANT POINTS. FIRST, JUDGE THOMAS SHOULD NOT BE CONFIRMED BECAUSE AS A FEDERAL OFFICIAL OF THE EXECUTIVE BRANCH OF GOVERNMENT HE CONSISTENTLY DEMONSTRATED AN OPEN CONTEMPT FOR THE LAW. FOR THE YOUTH OF AMERICA AND ALL PEOPLE OF THE WORLD WHO BELIEVE IN RULE BY LAW JUDGE THOMAS IS A MONSTROUS NEGATIVE ROLE MODEL.

MY SECOND POINT RELATES TO THE OBLIGATION I FEEL TO COMMUNICATE TO YOU THE DEEP FEELINGS OF MY CONSTITUENTS CONCERNING THIS NOMINEE AND THE PROCESS WHICH LED TO THE PLACEMENT OF HIS NAME BEFORE THIS COMMITTEE. JUDGE CLARENCE THOMAS IS BEING REWARDED FOR THE LOYAL AND OBEDIENT EXECUTION OF THE ORDERS OF TWO PRESIDENTS AND HIS POLITICAL PARTY. IN THE PROCESS OF CARRYING OUT THOSE ORDERS JUDGE THOMAS HAS TRAMPLED ON CERTAIN LEGAL PRINCIPLES WHICH ARE VITALLY NECESSARY FOR THE SURVIVAL OF OUR PEOPLE. IT IS IMPORTANT THAT I PLACE ON THE RECORD THE RESPONSE OF THE GREAT MAJORITY OF AFRICAN AMERICAN PEOPLE TO HIS BEHAVIOR AND THE CLEVER MANEUVERS OF HIS SPONSOR.

ON THE MATTER OF JUDGE THOMAS' CONTEMPT FOR THE LAW LET ME MAKE IT CLEAR THAT I SPEAK FROM THE EXPERIENCE OF DIRECT OBSERVATION. AS A MEMBER OF THE EDUCATION AND LABOR COMMITTEE WHICH HAS OVERSIGHT RESPONSIBILITY FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION I SERVED ON NUMEROUS PANELS WHICH HEARD TESTIMONY FROM JUDGE THOMAS. AT THIS POINT I WOULD LIKE TO STATE FOR THE RECORD THAT THERE IS A VOLUMINOUS SET OF RECORDS OF HEARINGS AND GENERAL ACCOUNTING OFFICE REPORTS WHICH COMPRISE A BODY OF EVIDENCE TOO LITTLE ANALYZED OR REFERRED TO SINCE JUDGE THOMAS WAS NOMINATED.

JUDGE THOMAS HAS TESTIFIED BEFORE CONGRESSIONAL COMMITTEES AN EXTRAORDINARY 56 TIMES (55 PUBLISHED; 1 UNPUBLISHED). THIS LARGE NUMBER OF APPEARANCES DOES NOT SIMPLY REFLECT THE JUDGE'S LONG TENURE. VERY LITTLE OF CLARENCE THOMAS'S CONGRESSIONAL OVERSIGHT TESTIMONY WAS MERE REPORTING OR WAS OTHERWISE ROUTINE. MOST OF IT WAS CONTROVERSIAL AND MUCH OF IT EXPRESSED THE EXASPERATION OF HOUSE COMMITTEES WITH HIS ADMINISTRATION OF THE LAW. IN THE SAME VEIN ARE TEN GAO REPORTS, AN UNUSUAL NUMBER AND MOST OF THEM HIGHLY CRITICAL OF THE NOMINEE'S ADMINISTRATION OF THE LAWS UNDER HIS JURISDICTION. IT IS JUDGE THOMAS' ACTUAL PROFESSIONAL RECORD WHILE SERVING IN THE GOVERNMENT THAT SHOULD COUNT MOST TO THE OUTCOME OF THESE DELIBERATIONS. HOW JUDGE THOMAS HAS VIEWED HIS LEGAL RESPONSIBILITIES IN THE PAST IS THE BEST EVIDENCE OF HOW HE IS LIKELY TO DISCHARGE THEM IN THE FUTURE.

THE CONCLUSION THAT WE HAVE REACHED IS THAT JUDGE THOMAS FAILED

OVER THAT PERIOD OF TIME TO CARRY OUT THE CONSTITUTIONAL OBLIGATION OF MEMBERS OF THE EXECUTIVE BRANCH TO "TAKE CARE THAT THE LAWS ARE FAITHFULLY EXECUTED" AND THAT HE EXHIBITED A PERVASIVE DISRESPECT FOR CONGRESS AND FOR THE LEGISLATIVE PROCESS. OUR CONCLUSION, WHICH IS AMPLY SUPPORTED BY THE EVIDENCE, IS ALL THE MORE DAMNING WHEN IT IS RECOGNIZED THAT HIS YEARS IN THE EXECUTIVE BRANCH CONSTITUTE ALMOST ALL OF THE EXPERIENCE THAT CLARENCE THOMAS HAS TO OFFER IN SUPPORT OF THE PROPOSITION THAT HE IS QUALIFIED TO SERVE ON THE SUPREME COURT. FAR FROM ASSISTING HIS CANDIDACY, THE PERFORMANCE OF JUDGE THOMAS AS A FEDERAL OFFICIAL PROVIDES POWERFUL REASONS WHY HE SHOULD NOT BE CONFIRMED.

TWO YEARS AGO, 14 MEMBERS OF THE HOUSE OF REPRESENTATIVES, INCLUDING 12 CHAIRS OF COMMITTEES HAVING JURISDICTION OVER THE EEOC AND FIVE MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS, WROTE TO PRESIDENT BUSH ASKING THAT CLARENCE THOMAS NOT BE NOMINATED TO THE COURT OF APPEALS. AFTER REVIEWING THE RECORD, THE WRITERS OF THE LETTER SAID THAT THOMAS HAD "RESISTED CONGRESSIONAL OVERSIGHT AND BEEN LESS THAN CANDID WITH LEGISLATORS ABOUT AGENCY ENFORCEMENT POLICIES." THESE MEMBERS OF CONGRESS CONCLUDED THAT THOMAS HAD DEMONSTRATED AN "OVERALL DISDAIN FOR THE RULE OF LAW".

TIME WILL NOT PERMIT ME TO OFFER MORE DETAIL ON THIS POINT; HOWEVER, PAGES 4 THROUGH 9 OF THE WRITTEN STATEMENT OF THE CONGRESSIONAL BLACK CAUCUS DOES PROVIDE AMPLIFICATION FOR THIS ARGUMENT.

AS A REAGAN ADMINISTRATION APPOINTEE JUDGE THOMAS WAS THE MODEL OF LOYALTY AND OBEDIENCE. HE DEFENDED THE ADMINISTRATION'S DEPORMED AND DISTORTED CIVIL RIGHTS AND EEOC POLICIES WITH GREAT ARROGANCE AND PASSION. IT IS PERFECTLY LOGICAL THAT HIS PARTY WOULD SEEK TO REWARD SUCH A DEDICATED TEAM PLAYER. BUT IT IS NEITHER LOGICAL NOR MORAL FOR THE SENATE OF THE UNITED STATES TO PARTICIPATE IN THIS POLITICAL CLUBHOUSE PROMOTION PROCESS.

LIKE NUMEROUS OTHER REAGAN ADMINISTRATION APPOINTEES JUDGE THOMAS REPEATEDLY DISPLAYED GREAT CONTEMPT FOR THE LAW. ALTHOUGH SWORN TO UPHOLD AND IMPLEMENT THE LAW, JUDGE THOMAS REPEATEDLY DELAYED, SABOTAGED AND BLOCKADED THE PROCESS OF ENFORCEMENT OF THE LAWS ENTRUSTED TO HIS ADMINISTRATION. IN THIS PATTERN OF BEHAVIOR JUDGE THOMAS WAS CERTAINLY NOT UNIQUE AMONG REAGAN ADMINISTRATION OFFICIALS. FOR EIGHT YEARS CONTEMPT FOR THE LAW WAS A PART OF THE STYLE AND THE STRATEGY OF THE EXECUTIVE BRANCH OF GOVERNMENT. MEMBERS OF CONGRESS REPEATEDLY ENCOUNTERED THIS CONTEMPT FOR THE LAW NOT ONLY IN THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UNDER JUDGE THOMAS, BUT ALSO IN OSHA, IN THE EPA, IN THE DEPARTMENT OF JUSTICE, AND AS THE WHOLE WORLD KNOWS ON THE NATIONAL SECURITY COUNCIL. OLIVER NORTH'S SEPARATE GOVERNMENT IN THE BASEMENT OF THE WHITE HOUSE WAS THE MOST VISIBLE AND THE MOST DANGEROUS EXAMPLE OF THIS CONTEMPT FOR THE LAW.

WHAT MUST BE RECOGNIZED BY THIS COMMITTEE IS THAT THE SPIRIT OF OLIVER NORTH WAS RAMPANT THROUGHOUT ALL OF THE UNITS OF THE REAGAN

ADMINISTRATION. AS A MEMBER OF CONGRESS I REGRET VERY MUCH THE HELPLESSNESS AND INABILITY OF CONGRESS TO CURTAIL AND COUNTERACT THE BRAZEN CONTEMPT FOR LAW EXHIBITED BY SO MANY EXECUTIVES WHO WERE SWORN TO UPHOLD AND IMPLEMENT THE LAW. I PRAY THAT IN THE NEAR FUTURE WE WILL FIND WAYS TO GUARANTEE THAT SUCH A WIDESPREAD HEMORRHAGING OF THE INTEGRITY OF GOVERNMENT WILL NEVER TAKE PLACE AGAIN. ONE GIANT STEP TO RESTORE RESPECT FOR THE LAW AND THUS RESUSCITATE THE VITAL MORAL AUTHORITY OF OUR GOVERNMENT IS A STEP THAT CAN BE TAKEN IMMEDIATELY BY THIS COMMITTEE AND THE MEMBERS OF THE SENATE.

LET IT BE CLEARLY STATED BY THIS COMMITTEE AND THIS SENATE THAT A NEW STANDARD HAS BEEN ESTABLISHED; THAT REGARDLESS OF THE DESIRES OF THE PRESIDENT TO REWARD THE LOYAL AND THE OBEDIENT, ANY PERSONS WHO HAVE IN THEIR PUBLIC PERFORMANCE AT ANY LEVEL OF GOVERNMENT DISPLAYED A CONTEMPT FOR THE LAW SHALL NOT BE SANCTIONED AND CONFIRMED FOR THE FEDERAL JUDICIARY. IN OTHER WORDS THE PRICE OF OBEYING ORDERS INSTEAD OF UPHOLDING AND IMPLEMENTING THE LAW SHOULD BE DENIAL OF THE PRIVILEGE OF ADJUDICATING AND INTERPRETING THE LAW.

TO IGNORE THE PERFORMANCE RECORD OF JUDGE THOMAS OR ANY OTHERS WHO BEHAVED IN A SIMILAR MANNER IS TO CONTRIBUTE GREATLY TO THE POISONING OF THE MORAL ENVIRONMENT OF AMERICA. WHILE OUR DEMOCRATIC POLITICAL SYSTEM MAY AT THIS POINT LEAVE US PARALYZED WITH RESPECT TO OUR ABILITY TO CURTAIL CONTEMPT FOR THE LAW IN THE

EXECUTIVE BRANCH OF GOVERNMENT, I URGE YOU TO PLEASE FULLY UTILIZE THE MECHANISM OF CHECKS AND BALANCES TO SEND THE MESSAGE THAT THOSE WITH A RECORD OF HIGH LEVEL LAWLESSNESS SHALL NOT BE ALLOWED TO ASCEND TO THE HIGHEST COURT OF OUR NATION.

→ IN ADDITION TO HIS JOB PERFORMANCE, JUDGE THOMAS' PERFORMANCE BEFORE THIS COMMITTEE HAS SET A DISMAL EXAMPLE BEFORE THE YOUTH OF AMERICA AND THE PEOPLE OF THE WORLD. THE NOMINEE HAS USED WHAT COULD ACCURATELY BE LABELED AS THE EQUIVALENT OF THE FIFTH AMENDMENT AS HE HAS RUN FROM HIS OWN RECORD. WHAT MANNER OF GOVERNMENT ARE WE TO TOLERATE PEOPLE IN HIGH PLACES WHO BLATANTLY EVADE HONEST QUESTIONS? WHERE IS THE PARENT WHO WOULD TOLERATE SUCH INSULTING BEHAVIOR FROM A TEENAGE SON OR DAUGHTER? A PRECEDENT OF TOLERATING EVASIVE ANSWERS WAS SET WITH JUDGE SOUTER WHICH DISCREDITS THE CONFIRMATION PROCESS. THAT PRECEDENT SHOULD BE STRUCK DOWN NOW. JUST AS MEMBERS OF CONGRESS ARE NOT ALLOWED TO CAST SECRET BALLOTS ON ISSUES, NO PERSON SHOULD BE ALLOWED TO ASSUME A LIFE-TIME SEAT ON THE COURT WITHOUT THE FULLEST POSSIBLE DISCLOSURE OF HIS PHILOSOPHY AND IDEAS.

FINALLY, I WOULD LIKE TO BRIEFLY CONVEY TO YOU THE SENTIMENTS OF MY CONSTITUENTS ON THIS NOMINEE AND THE NOMINATION PROCESS. I REPRESENT THE TWELFTH CONGRESSIONAL DISTRICT IN NEW YORK WHICH IS NINETY PERCENT AFRICAN-AMERICAN. I HAVE BEEN A PUBLIC OFFICIAL FOR MORE THAN TWENTY-THREE YEARS AND I KNOW HOW TO READ MY CONSTITUENTS. THE OVERWHELMING REACTION TO THE NOMINATION OF

CLARENCE THOMAS WAS ONE OF DISBELIEF AND A SENSE OF BETRAYAL -- AND AMONG THE YOUTH IMMEDIATE BITTERNESS.

IF YOU WANT TO TRULY UNDERSTAND THE THOUGHTS AND FEELINGS OF THE OVERWHELMING MAJORITY OF AFRICAN-AMERICANS IN THIS COUNTRY, THEN TRY TO IMAGINE HOW THE FRENCH WOULD HAVE FELT IF THE COLLABORATOR MARSHAL PETAIN HAD BEEN AWARDED A MEDAL AFTER THE LIBERATION OF FRANCE IN WORLD WAR II, OR IF IN NORWAY, QUISLING HAD BEEN MADE A HIGH OFFICIAL IN THE GOVERNMENT. TRY TO PUT YOURSELF IN THE PLACE OF A SOLDIER IN THE CONTINENTAL ARMY AFTER VALLEY FORGE AND ALL OF THE OTHER DIFFICULT STRUGGLES; TRY TO IMAGINE THE FEELINGS OF SUCH A SOLDIER IF HE WAS FORCED TO WATCH A CEREMONY WHERE GENERAL GEORGE WASHINGTON PROMOTED BENEDICT ARNOLD TO THE LEVEL OF A GENERAL. IMAGINE THE TEARS IN THE EYES OF THOSE STRONG MEN THAT SUCH AN ACT WOULD HAVE GENERATED.

FOR THE MASSES OF BLACK PEOPLE JUDGE CLARENCE THOMAS IS A MAN WHO HAS CLEARLY AND CONSISTENTLY STOOD AGAINST THOSE LEGAL PRINCIPLES, PHILOSOPHIES AND IDEAS WHICH ARE VITALLY NECESSARY FOR OUR SURVIVAL AND CONTINUING PROGRESS. THE ELEVATION OF THIS MAN TO THE SUPREME COURT WOULD BE A GROSS INSULT, A CRUEL SLAP "IN THE FACE" OF ALL AFRICAN-AMERICANS.

REMEMBER THAT DANTE, IN THE INFERNO, ASSIGNED THE LOWEST PIT IN HELL TO BRUTUS, THE MOST INTIMATE AND TRUSTED OF ALL TRAITORS. IMAGINE WHAT OTHERS THROUGHOUT HISTORY MIGHT HAVE FELT AS THEY

BEHELD THE ELEVATION OF ONE THEY PERCEIVED TO BE A TRAITOR TO THEIR CAUSE AND YOU WILL UNDERSTAND HOW A CONFIRMATION OF JUDGE THOMAS WILL GIVE BIRTH TO A BOTTOMLESS PIT OF BITTERNESS THAT WILL ENDURE FOR GENERATIONS TO COME.

→ IT IS MY PLEA TO YOU THAT THE SENATE SHOULD NOT ACQUIESCE AND PERMIT THE CONTINUING EROSION OF THE MORAL FOUNDATION OF AMERICA. THE SENATE SHOULD NOT ACQUIESCE AND PARTICIPATE IN THE FURTHER TRIVIALIZING OF THE SUPREME COURT OF OUR NATION. ON THE APPOINTMENT OF JUDGE CLARENCE THOMAS IT IS MY PLEA THAT YOUR VOTE ON CONFIRMATION BE A CLEAR AND DECISIVE NO!

The CHAIRMAN. Thank you very much, Congressman.  
Congressman Washington.

STATEMENT OF REP. CRAIG A. WASHINGTON

Mr. WASHINGTON. Thank you, Mr. Chairman.

Mr. Chairman and members, I thank you for the privilege and honor of speaking before you today. We truly appreciate this opportunity to express our views on a vitally important nomination.

I speak in opposition to the nomination of Judge Clarence Thomas. My opposition to Judge Thomas has nothing at all to do with his personal political views. It has nothing at all to do with the politics that resulted in his nomination, but, rather, based upon a scientific, objective, reasoned and calm analysis of Judge Thomas' legal writings, legal opinions, editorial opinions, remarks and speeches. I have concluded at least the following:

Judge Thomas has a disturbingly paradigmatic disdain and disregard for legal precedents and *stare decisis*. In fact, I don't think he knows what *stare decisis* means. Judge Thomas has shown a previous long-standing disrespect for the civil liberties of groups. Judge Thomas has espoused as a fulcrum of his legal thought the concept of natural law, and Judge Thomas has shown a lack of respect for the rule of law.

We have reached these and other conclusions only after much research and analysis. As you know, it is often difficult to take a stand that would seem to be unpopular. It is our duty, however, as elected officials, to speak against the nomination of Judge Clarence Thomas, based upon the facts.

Our position is clearly based upon just that, the fact that the elevation of Judge Clarence Thomas to the Supreme Court of the United States is dangerous for all Americans. The quintessential underpinning of Anglo-Saxon jurisprudence is that, if you have a case with similar facts, similar evidence and similar legal predicates, you should reach a similar outcome. *Stare decisis*, which in Latin, as you know, means standing by decided matters, is a doctrine of following rules of principles laid down in previous judicial decisions.

The most blatant example of Judge Thomas' disregard for legal precedent came when Judge Thomas was chairman of the Equal Employment Opportunity Commission. As chairman of the EEOC, Judge Thomas spoke out against the Supreme Court's approval of racial and sexually defined employment goals and timetables.

Judge Thomas states that he considered goals and timetables to be a weak and limited weapon against forms of discrimination. There have been at least four Supreme Court decisions on race conscious remedies in which the Supreme Court has approved them. They are, as you know, *United States v. Paradise, Local 28 Sheet-metal Workers v. EEOC, Local 93 Firefighters v. Cleveland, and Johnson v. Transportation Agency, Santa Clara County, California*.

There are times when we all disagree with the law. Rules and regulations make our society stable. If we all agree that, for better or worse, the rule is that privates salute generals and that we should drive the speed limit as established by the legislatures of our various States, then we should obey those rules and regula-

tions. I might not like the person wearing the uniform of the general, but if I am a private and he or she is a general, I am bound to respect the rank of the general.

Judge Thomas' opinion of *Brown v. Board of Education* is simply this: If individual violations of discrimination came to Judge Thomas and complained of discrimination, they would be heard. However, if a group complained and presented evidence of group-wide systemic discrimination, he would not hear such evidence. This notion is in direct contradiction with the fundamental rights that the Constitution was intended to protect.

Moreover, the Bill of Rights and other amendments were intended to protect those who are similarly situated from the tyranny of Government. Natural law has as much to do with judicial opinion as voodoo has to do with the practice of medicine. As an example of the application of natural law would be to take the example I used earlier about driving the speed limit. Under a theory of natural law, the majority of people have agreed that we should drive the speed limit. If one were to adhere to a natural law philosophy, however, one could state, "Since I've paid for my car and I've paid part of the taxes to build this highway, I can drive as fast as I wish. I'm not bound by mere legal opinion, I'm bound only by myself." The logical extension of such a philosophy is that we would have no law, no order, and no rules to govern our society.

During Judge Thomas' tenure as chairman of the EEOC, he refused to process cases of age discrimination, in spite of the fact he had been ordered to do so by several governmental bodies. Instead, Judge Thomas allowed 13,000 age-discrimination cases to expire and go unresolved. It was Judge Thomas' duty to file these case. It did not matter that he disagreed with the law. He, like others, was bound to respect and follow the law, regardless of whether he liked it or not.

I oppose Judge Thomas based upon these aforementioned facts. The choice, based upon my evidence and that of my Congressional Black Caucus colleagues is that Judge Thomas is not a worthy successor to Justice Thurgood Marshall. The difference that we have is Judge Thomas does not stem from reasonable and understandable differences over particular cases or remedies. Rather, Judge Thomas repudiates the fundamental role of the Supreme Court as a guardian of the constitutional freedoms and rejects the legacy of Justice Marshall.

On behalf of 25 of the 26 members of the Congressional Black Caucus, we respectfully urge you to reject the nomination of Judge Clarence Thomas. At the appropriate time, I will be happy to respond to your questions.

Thank you.

The CHAIRMAN. Thank you.

Before we move to Congressman Lewis, Senator Kennedy has a responsibility to be over in the caucus on another matter, but maybe you—

Senator KENNEDY. Thank you, Mr. Chairman.

I just want to join in welcoming our friends from the House and their testimony. We are getting first-hand information, some of our colleagues here, of individuals who had oversight responsibilities that directly related to the work of Judge Thomas, and their pres-

entation and their experience is certainly unique in terms of the kind of presentations that we have had.

We have members who have been leaders, most all of them, but some in particular have been working in civil rights legislation and also in striking down discrimination in employment, so their testimony is particularly valuable.

Our next speaker, John Lewis, who was out there and still bears the bruises of the physical struggles in the late 1950's and early 1960's, was a civil rights leader, not because he named himself one, but because others looked to him for leadership, and we heard some remarks from Judge Thomas in disparagement of many of those that bled and I think even died to eliminate some of the barriers of discrimination.

So, I want to just say, as one member of the committee, how we welcome all of your comments. I think it is enormously valuable to us. I apologize to Congressman Lewis for not hearing the testimony, but look forward to reading it in its entirety.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

I suspect Congressman Lewis would rather see you get the extension of the unemployment compensation, than listen to him, as much as he would like you to listen to him.

Congressman Lewis.

#### STATEMENT OF HON. JOHN LEWIS

Mr. LEWIS. Thank you, Mr. Chairman.

Mr. Chairman and distinguished members of the committee, I am pleased and delighted to be here with you today.

When I was growing up in the rural South in the 1940's and 1950's, I saw for myself the evil system of segregation and discrimination. I was bused long distances over unpaved roads, dusty in summer and muddy in winter, to attend overcrowded, poorly staffed segregated schools. For many blacks, they were not called high schools then, they were called training schools. An evil system, a way of life had been built on a foundation of racism, greed, hatred and a denial of basic human needs and human rights. It was a closed society, and everywhere I turned, I found closed doors.

I saw those signs that said "white men," "colored men," those signs that said "white women," "colored women," those signs that said "white waiting," "colored waiting." I grew up in a family with a mother and a father, six brothers and three sisters. We were very poor. The house in which we lived had no indoor plumbing or electricity. I read by the light of kerosene lamps.

But that does not make me qualified to sit on the highest court of the land! If you are going to vote to confirm Clarence Thomas to sit on the highest court of the land, you must have some reason other than the fact that he grew up poor in Pin Point, GA.

I also come here as one who participated in the civil rights movement of the 1960's, as one who was beaten, arrested and jailed on more than 40 occasions. During the 1960's, as I traveled and worked throughout the South, I saw civil rights workers and many people whom we were trying to help, with their heads cracked open

by nightsticks, lying in the streets, weeping from teargas, calling helplessly for medical aid.

I have seen old women and young children involved in peaceful, nonviolent protests, run down by policemen on horses, beaten back by fire hoses, and chased by police dogs. But also during the 1960's, we saw the Federal Government, and particularly the Supreme Court, as a sympathetic referee in the struggle for civil rights.

I can recall on one occasion when the Supreme Court issued a decision dealing with public transportation, an elderly black woman was heard to say, "God Almighty has spoken from Washington." The Supreme Court was there for the people then. That is no longer the case.

Let us set aside for the moment Thomas' view on abortion, which he won't share with you, his views on affirmative action, on which he has been incredibly unclear, and his views on natural law, which were one thing last year, something different when he was nominated, and still something else at this hearing last week. Let us set aside all of this and see what you have.

What you have is a nominee who wants to destroy the bridge that brought him over troubled waters. He wants to pull down the ladder that he climbed up. You have a nominee who has refused to answer your questions, a nominee who has defied the law, a nominee who has tried to stonewall this committee, a nominee who changes his story to suit the audience, a nominee who is running from his record.

As elected officials, men who have to run, you have come up against men who have to run on their records and others who run from their record. Well, Clarence Thomas is a man who is running from his record!

I ask you again, what reason do you have, other than the fact that he grew up poor in Pin Point, GA, to confirm Clarence Thomas' nomination to the Supreme Court? I know this is a tough decision for you to have to make. It was as tough decision for me to decide to come before you today. I have been advised by some that I should not testify against Clarence Thomas, because he is black. The color of Clarence Thomas' skin is not relevant. The person, his views and his qualifications are.

Leadership demands that we not avoid decisions, just because they are tough. It requires that we be fair, be critical and do what is right, not what may appear to be politically correct. You have information that the masses don't have. You know Clarence Thomas' record. You know the truth.

Mr. Chairman and members of the committee, as a member of the House, I don't want to tell you what to do. I cannot. But I do want to say that you have a mission, a mandate and a moral obligation, not just to our generation, but to unborn generations. The decision you make on the Thomas nomination will affect how we live well into the next century.

You cannot vote to confirm Clarence Thomas, unless you feel confident that Clarence Thomas will not bring his own agenda to the bench and that his decisions will not be burdened with his own preconceived notions about how things are or should be. You must feel confident in your gut that, as he himself put it, Thomas is fair, full of integrity, open-minded and honest.

Look at his record, listen to what he has said to you during this hearing. Hear what he has refused to say. You may have to sail against the current, but that is OK. I urge you to vote against confirmation of Mr. Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, gentlemen. I know you all used the phrase this is not easy for you to do. I suspect a lot of people think it was easy. I have some sense, some little sense, of how hard it must be. You have all fought your entire lives to see to it that black women and men are in positions of power, positions of authority, to be able to be role models to a generation of black children, and here you are, walking down that long walk across from the other body to come to this great, majestic room and tell a group of your colleagues on the Senate side not to vote for a man to the Supreme Court who is black, when not a one of you—I don't want to reveal all of your ages—but not a one of you failed to understand at some point in your lives the lash of legal segregation. The notion that 20 years ago, 30 years ago, any one of you would be in this room saying, "don't put any black person on the Supreme Court of the United States," would boggle the mind. And you are here, and as I said, I am confident of what you say when you say it is not an easy decision.

Let me be the devil's advocate with you for a moment, if I may.

Clarence Thomas and those who vociferously support Clarence Thomas say two things about black leadership in America and black leadership in the Congress—and you are the black leadership of the Nation. They say, No. 1, that this really only reflects a difference on affirmative action; that's what this is all about. The only thing you all are concerned about is affirmative action. Clarence Thomas is hostile to affirmative action, apparently—although I acknowledge, John, it is kind of hard to tell—and that's why you are here.

The second thing they say is that any black man who has suffered the indignities and injustices of a legally segregated system as well as a system, in my view, that continues to be segregated, in a much more sophisticated way these days, that that person's instincts have got to be right when they get on the bench; that in the end, whether or not he calls himself a Republican or a Democrat, conservative or liberal, he will do the right thing.

So the two big arguments that have been posited by supporters of Thomas and those who have been detractors of your position are (a) that this is all about affirmative action and a desire for you to maintain a position of black leadership in the Nation, your points of view, and (b) how could any black man with his background not do the right thing when it comes to issues relating to race.

Would any or all of you please comment for the record on both of those assertions that we have heard so many times in this committee?

Congressman Conyers.

Mr. CONYERS. Mr. Chairman, might I comment on that and ask before we begin that all of our individual statements be submitted and reproduced in the record.

The CHAIRMAN. They all will be. Anything beyond what you have said, if you have a statement, will be placed in the record as if read.

Mr. CONYERS. Thank you very much.

Of course, we have pointed out here in all of our testimony that this goes far beyond individual differences of how we approach civil rights; that we are talking about our lack of confidence that whether he will apply fundamental constitutional concepts in a way that is going to satisfy us far beyond affirmative action. We are talking about his conduct in 9 years of public office that required him to come before Congress as many times as you've heard here today.

We are talking about the fact that senior citizens are aggrieved about the way he handled age discrimination cases. We are talking about the women's organizations who are disturbed about where his views on privacy are going to lead. We don't know what is going to happen on natural law.

So I think it is patently obvious that this is not a single issue or some truncated difference of view on one part of the civil rights issue that we take. It would be trivial of us to come forward on that kind of a question.

I also very firmly believe that what happens here in these next few weeks before your body is going to determine whether we ever come forward with an adequate African-American nominee to replace Thurgood Marshall. And I think what we have to continue to watch very carefully is if he is confirmed, we are essentially closed down for Justice Marshall's representative. If he is not confirmed, I think the picture is open. We all know a long list of African-American jurists, male and female, with good constitutional experience and many others coming forward that could leave that picture open.

So I urge that we not accede to any notion that we are trivializing this confirmation process on a very narrow civil rights point.

The CHAIRMAN. Does anyone else wish to speak to either point?

Yes, Congressman Stokes.

Mr. STOKES. Mr. Chairman, at the expense of being redundant, I will forego speaking to part (a). I would like to speak to part (b) because I think that troubles many people. I think many people feel that any person born black, subjected to racism and the other indignities that black people have been subjected to in this society, once they get on that Court and once they have that paper that says they have a lifetime appointment, will then feel secure and be able to do the right thing. And I guess I have tried in my own mind to analyze it and try to understand this individual—and let's face it—what I have had to do is try to look at his record.

One of the most poignant things that points up the fears I have about him is in a case called *Moore v. City of East Cleveland*. I happened to represent East Cleveland. A 63-year-old grandmother who had taken in one of her grandchildren when he was less than a year old when his other died was charged on an ordinance that defined "family" as being only the parents and their children. In this home, this grandmother had taken in her own son and two grandchildren, one of whom was this 1-year-old child when his mother died. But they were not brothers; they were cousins. And under this particular statute, she was ordered by the municipality to evict

this child because the child did not fit the family definition under the ordinance.

She refused to do so, and she was jailed and fined. The case went up to the U.S. Supreme Court, and the U.S. Supreme Court found that this was an invasion by the municipality of the privacy of family. The Court recognized the fact that in the black family particularly, there is a need for the extension of the family to take in other relatives, so long as it does not break zoning laws and things of that nature. The Court found that this is in the course of American tradition, and that other ethnic groups have had to do this when they came to this country, and so forth.

Clarence Thomas was on a White House Task Force on the Family. They issued a report highly critical of this particular Supreme Court decision, meaning in effect that they would have jailed the grandmother and permitted the fine to stand. When I examined that case and his relation to it and the fact that he signed this report criticizing it, I asked myself how could this man who in your hearings made so much to-do about his grandparents and what they had done for him and his mother and for his family—and in fact I dare say to you that you know more about his grandparents, Mr. Chairman, than you know about him because he talked over and over again about what his grandparents had done—how then, you must say, can this same man then jail or want to have jailed this grandmother who took in her grandchild?

I think when you look at this, you get some answer to whether or not he would really go back to his roots and do the right thing. I don't think he will.

The CHAIRMAN. My time is about up, but I want to give you gentlemen a chance to respond if you'd like.

Mr. OWENS. Just quickly, Mr. Chairman, I would like to say that the record of Clarence Thomas with respect to affirmative action and civil rights is not subtle at all. It is not unclear at all. It is not mysterious at all. It is quite clear where he stands. He had 8 years, and his performance in office at EEOC made it quite clear, and most African-Americans clearly understand this. After they get over the shock of understanding that a person of his education and his position could espouse those ideas, their reaction is we're quite sorry, but—I'll tell you what one lady told me at church. "Let's take the Christian approach," she said. "We want you, Congressman, to go out there and fight as hard as you can to see that this man does not get a place on the Supreme Court. But since the President is powerful, and we know that it is possible you might lose and he might be placed on the Supreme Court, after you get through fighting and you lose, then we'll start praying that he will be born again and will act right when he gets on the court. But we'll fight first, and then we'll pray later."

The CHAIRMAN. Thank you. Mr. Washington.

Mr. WASHINGTON. Very briefly, Mr. Chairman, on the first part of your question, I'd like to rely upon my 20 years' experience as a trial lawyer which I brought to this job. Whenever I was trying a murder case, and I couldn't do much to get over all the facts that the prosecution had assembled against me, I'd try the deceased person. It's an attempt to divert your attention from the issue by talking about all these organizations that have come out in opposi-

tion to him. If our focus were as narrow as a difference of opinion over affirmative action, as a trial lawyer I believe that the true art of cross examination would get to the truth in that, and you'd be able to find it real soon.

We have not talked about our difference of opinion with him on affirmative action. We have talked about things that we think are a lot more important to the function that he is about to ascend to, with your permission.

On the second point, to suggest that a black man who has suffered as much as he has will "do the right thing", I find to be condescending, both condescending and patronizing. If we set that up as a standard, then, the Supreme Court ought to adopt it as a standard, and all these people who are suggesting that it is the right thing to do ought to adopt it as a standard.

That means that any time that a black person who is not qualified goes to apply for a job as a truckdriver, instead of looking at whether he can drive a truck or not, just see what kind of background he came from. If you are applying for a job as a school-teacher, if you are applying for a job as a U.S. Senator, then you ought to be able to get out and campaign. Well, I'm not as qualified as Senator Grassley, I am not as adroit at the issues as Senator Grassley, but by God I come from humble beginnings, so by God, give the job to me. That's ludicrous. It is ludicrous to suggest it, and it is condescending, and black people don't like it a bit.

Mr. LEWIS. Mr. Chairman, let me just be brief and say as black Members of the Congress and as Members of the Congress, we don't have anything to gain from coming here being against the confirmation of Clarence Thomas.

The CHAIRMAN. Well said.

Senator SIMON. Mr. Chairman, I know it is not my time but I just got word I am supposed to be over on the floor on an amendment that I have there. If I could just take 1 minute.

The CHAIRMAN. Would you all mind if he takes 1 minute out of order?

Senator THURMOND. No. Go ahead.

The CHAIRMAN. All right.

Senator SIMON. First of all, I really appreciate your testimony and your standing up. I served in the House with three of my colleagues here—Congressman Conyers, Congressman Stokes, and Congressman Owens—and while I didn't serve in the House with Congressman Lewis, I have known him for many years.

One other factor, and that is, if I can go back to something that happened in Atlanta many years ago. You had two black leaders—Frederick Douglass, who was an advocate, who said we ought to get the right to vote, we ought to have civil rights; you had another leader who brought himself up from the bootstraps, but who was an accommodator, who said in what has been called the "Atlanta compromise speech", Booker T. Washington said we ought to forget those things, we ought to just do the best job we can wherever we are. And the white majority seized on Booker T. Washington's statement, and it was used not for the benefit of African-Americans.

One of the things that we do here is we elevate someone who up to this point has been an accommodator rather than an advocate. I

mention that in connection with this brief question. One of the arguments used, and I hear it from my friends in the African-American community, is "I don't like Clarence Thomas' views, but if we don't take him, we are going to get somebody with the same views who is white; and we ought to have an African American on the court."

Congressman Conyers has answered that in part by saying this for all practical purposes probably precludes another viewpoint from the African-American community on the court.

I would be interested in how you would answer, and is the Booker T. Washington analogy a fair one or an unfair one?

Mr. CONYERS. It is. DuBois and Washington was the reference you were making to in the "Atlanta compromise", and we hear that—better to take a chance now, and keep your fingers crossed. Will he change? And you know, gentlemen, I have never approached a confirmation process supporting somebody that I didn't agree with and hoping they'd change.

I go back to Haynesworth, Carswell and on down the line, up into Bork, and it makes no sense. And I think your accommodationist parallel that you draw, Senator Simon, has validity. As a matter of fact, we had one of our great historians, John Hope Franklin, draw up comments for us that he submitted in which he went back to that day and made a reference quite similar to the one that you draw at this time.

Mr. STOKES. Senator Simon, I can only say in answer to your question, "If you don't get Thomas, then you probably will not get another black on the Court," that the only way to answer that is to say we will just have to be patient and wait our time. The fact is that if we don't get Thomas at this time, we don't get black at this time, then we will just have to be patient and wait.

It is as bad to have a bad appointee on there who is black as it is to have a bad appointee on there who is white. If Bork was wrong for the Court, Thomas is wrong for the Court, and you have to stand with that. You can't have a separate criteria.

Mr. OWENS. It is hard to believe, Senator, that there would ever be a situation where two blacks would be appointed to the Court, we just don't believe it is going to happen. As long as one is there, we are not likely to have another. It is hard to believe that Judge Thomas will ever change very much, because, as a member of the Reagan administration, he was one of the most outspoken and belligerent of the executive branch team.

He, of course, has been promoted and sponsored by people who are deeply rooted in the conservative philosophy, which is directly opposed to the kind of principles and the kinds of ideas that are necessary for the advancement of African-American people. The likelihood that he is going to change and not be grateful to his sponsors and do something different, we find it hard to believe that is going to happen.

We find it hard to believe that we won't be placed in a position where a member of the Supreme Court, occupying that position, which is quite an exalted one, will not be quoted extensively and used against us. If I was in Moscow or London or some other part of the world, and Judge Thomas made a statement and I made a statement in direct opposition to it, I would expect the people in

London or Moscow or any other part of the world to automatically defer to Judge Thomas and assume that a judge on the Supreme Court, you know, speaks with more authority and has more credibility than a Congressman, and that's the way it is going to be. He is going to be in a position where he can do great harm to the things that we believe in and to the people that we represent.

Mr. WASHINGTON. Senator, let me just say, in chess, as you know, there's a saying that if black moves first, black will most often win, not because of the color, it doesn't matter what the colors are, but the piece that moves first in chess, two similarly situated chess players playing, the person who moves first is more likely to win than the other, which comes to the question, it seems to me, that you raise about Judge Thomas.

I think the question is not whether if the Senate, in its wisdom, rejects this nomination, whether we are likely to get a white person or a Hispanic person or a woman or someone else, the question is whether they are qualified. If you turn that question over, the other side is, if he were a white person, if he were a woman, if he were a Hispanic, if he were anything other than black, with the paucity of qualifications that he brings with him and the grievances that have been unearthed at these hearings and before, is it any question that there would be a good deal of resentment and a good deal of opposition to him.

We have come too far—I don't mean black people, I mean all people, I mean America has come too far since the Civil War, since the 13th, 14th and 15th amendments, we didn't come all the way to here to say, when it comes down to it, that the color of the skin matters more than anything else. If he is not qualified, he is not qualified. If he is not qualified, making him black does not make him qualified.

Mr. LEWIS. Senator Simon, let me just respond by saying this man is very young, and if he is conformed by the Senate, he will be on the Court for many, many years to come. He will emerge as a symbol, as a symbol for hundreds, for thousands and millions of African-Americans. Is this the symbol that we want, as African-Americans?

The Supreme Court, during the 1960's, starting in 1954 and during the 1960's, created a climate, an environment to make this country something different, something better. We don't want to go back.

Senator SIMON. I thank all of you, and I thank Senator Thurmond for yielding.

The CHAIRMAN. Thank you.

Senator Thurmond.

Senator THURMOND. Thank you.

I want to welcome you all today to this hearing, not only as Democratic Congressmen, I believe you all are Democrats, but also as prominent Democratic leaders.

I want to mention one thing about Congressman Stokes regarding the White House report. Judge Thomas testified that he contributed the housing section to this report, but that he did not endorse the whole report. I thought I would mention that for your information. I don't think you distinguished that difference in your statement.

Mr. STOKES. No, Senator, I didn't. What I said was that he was on the White House Task Force on the Family and that he signed the report, which criticized the Supreme Court for its ruling in that case. In criticizing it, I could have said he also criticized Justice Marshall, because Justice Marshall was on the concurring opinion with Justice Brennan, but I knew nothing about the housing section.

I do know that he said he didn't read the report in your hearings here and he said that he just signed it, I do know that.

Senator THURMOND. Well, he testified at the hearings that he did not endorse that whole report. I thought you ought to know that.

Mr. STOKES. Certainly.

Senator THURMOND. Now, I want to mention this to you: You are all Democrats. A great many of the black people now are joining the Republican Party, and I hope you will respect their right to do that. There is a general feeling—whether it is true or not is another question, but there is a general feeling that black Democratic leaders prefer not to support a black for a high position unless he is a Democrat. There is a general feeling out there to that effect, and I just want to pass that along to you.

We are glad to have you here and we thank you for coming.

The CHAIRMAN. Would you all like to say thank you in order? [Laughter.]

Mr. WASHINGTON. I would like to say that I appreciate that, Senator, but I would hope that you would take that with a grain of salt, quite frankly, from those who make those statements. I think you will find, Senator, that we have at least always known that there is as wide a divergence of views and opinions in the black community as there is in any other community. It just happens that most of the vocal leaders in the 1940s and 1950s and 1960s happen to have been associated with the Democratic Party. We recognize that President Lincoln was a Republican. Some of my best friends are Republicans. [Laughter.]

We have been trained, Senator, because most of our lives and most of us are old enough, without telling our ages, for most of our lives we have had to confront racism in many forms. It has become more sophisticated now, but we recognize that—we would be the last people on earth to put people in a group, because prejudice means prejudging based upon group identification. We don't look at Republicans as being Republicans. We look at the character of the individual.

I count among some of my best friends and some of the people I admire the most Republicans who I consider to be champions of civil rights, like Senator Specter. I am not saying that just because he is here. I have been watching him on television. Senator Hatch and I disagree on a lot of things, but I think we consider ourselves friends.

Don't listen to those who tell you that we are trying to keep down the movement. We want many blacks to be involved in the Republican Party. We want every black person to vote. We are not like those who discourage people from going to the polls to vote. We think that the best democracy is one where all people participate.

Senator THURMOND. I hope you will associate more with your Republican friends, they may win you over yet.

Mr. WASHINGTON. They have got their work cut out for them, Senator. [Laughter.]

Senator THURMOND. I want to say this: I think it is to the advantage of the black people of this country to be in both parties.

Mr. WASHINGTON. Yes, sir.

Senator THURMOND. For years and years, the South was solid Democratic. We got no attention from Democrats. They had us in the bag. We got no attention from the Republicans, because they knew they couldn't get us. I think it is to the advantage of your people that you have blacks in both parties and, in that way, I think you will get more attention than ever.

We are glad to have you here.

The CHAIRMAN. Thank you, Senator.

Senator Hatch.

Senator HATCH. Well, I just want to welcome all of you here. I just got back from being out in my home State with the President and just came in, but I at least wanted to come up and say hello.

We are happy to have your testimony. I am a little disappointed that it is not more favorable to Judge Thomas, but each of you is a friend and I have great admiration for you.

I do not have any questions. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Grassley, who has been waiting patiently and kind enough to let everybody else go ahead. Senator Grassley?

Senator GRASSLEY. Thank you.

I welcome two of my former colleagues in the House of Representatives here to the Senate side, and I am glad to become more acquainted with others, although I have known Congressman Lewis for quite a while.

You know, I have never walked in the shoes of African-Americans, and I don't think we work hard enough to understand the problems of race relations in America. We all try, but probably do not try hard enough. So, I am not here to preach. I guess I am here to try to tell you problems that I have, as I measure the testimony of the Congressional Black Caucus and the testimony of other black Americans, I guess I have to measure the testimony of everybody, and that is my responsibility.

I want to tell you that I appreciate your testimony. I suppose that if I were going to be really candid, I would say that I am troubled by the position of what I would say is the elected leadership or the so-called leadership of the black community's national organizations, as well as the Congressional Black Caucus, in opposing Judge Thomas, because we have also had several panels of witnesses who are black Americans, let me say from the grassroots, as opposed to the elected leadership, and who know Clarence Thomas and have spoken eloquently about his commitment and devotion to insuring equal opportunity.

Just yesterday, as an example—and you probably heard it as well as I did—we had this woman from Compton, CA, speaking for herself but also a member of the NAACP chapter there, Ms. Holi-field, who laid down the challenge, when she was speaking about the group you represent, the Congressional Black Caucus, she

said—and I think maybe some of you, in the statements just made, probably have indicated to me that you understand this—26 members of the Congressional Black Caucus don't represent 30 million black Americans, any more than 26 white Congressmen could represent 200 million white Americans. That was her opinion.

Besides that, we have polls—and I know we cannot make decisions here in the Congress based upon public opinion polls, and maybe part of the problem with Congress is maybe too often we do, but we have polls showing a majority of black Americans support the confirmation of Judge Thomas to the Supreme Court, and only this week, the ABC News poll showed 58 percent of black Americans support Judge Thomas' confirmation.

I also had an article that I had collected for this hearing that quoted then Lt. Gov. Douglas Wilder, speaking out, espousing what I think are some of the same ideas as Judge Clarence Thomas might advocate, and I would read just a couple of sentences from the Washington Post story in the fall of 1986:

In speech after speech, Wilder, who surprised many politicians with his November 5th election here, is telling black audiences something that they say white politicians can't suggest—stop making excuses, and take control of your destiny.

And then going on to quote.

But Wilder, a 55 year-old Richmond lawyer who calls himself a conservative on many issues, is delivering his message with lowkey rhetoric that warns blacks not to expect government to resolve many of their problems.

So I don't feel like I can ask you questions, just kind of give you some idea of some wrestling that goes on as I compare your opinions with those of other black Americans.

I guess I would just close by expressing my view that Judge Thomas shouldn't be condemned because he challenged the status quo in his search for new answers to some old problems. He probably was able to do a better job of that as a policymaker than he is going to be able to do as a Supreme Court Justice, but he will be in a powerful position and will be a leader for these causes, even though it is interpreting law rather than helping to make law.

Well, I appreciate your listening to me, and I also appreciate your testimony.

Mr. CONYERS. Senator Grassley, could I just point out to you that the NAACP had a discussion—as a matter of fact, they met with Judge Thomas—and there was one chapter that decided not to go along with the decision to urge that his nomination be rejected, and that was the chapter in Compton, CA. That was out of approximately 2,200 chapters across the country, and I think it really illustrates the exception rather than the rule.

I might also point out in my own district, I can tell you quite assuredly that there is no majority of people who support Clarence Thomas. What we have is a phenomenon I'd like to just explain that might make you rest a little bit more easily about what seems to be support for Judge Thomas.

When Judge Thomas, African-American, was nominated to succeed Justice Thurgood Marshall, nationally, black America was overjoyed. I would warrant to you that 90-something percent of black America had never heard of Clarence Thomas before. With all due respect to him; he was an inside-the-beltway government bureaucrat. But as we began to reveal the difficulty with his track

record and the reasons that we opposed him, which spread not just from the Congressional Black Caucus but through the church leadership, the civil rights community, the labor community, women's organizations, the understanding of him has completely changed. And I think that you should really understand that dynamic. We were so happy to have a black name that that led to immediate support, regardless of whether we knew him or not.

Mr. STOKES. Senator, if I could just make an additional point here, the lady who spoke to you is absolutely right in the sense that we do not speak for all black Americans, nor do we presume that the 26 of us in the Congressional Black Caucus can speak for all Americans.

First, while many of us represent in our individual congressional districts, majority black constituents, we also represent white Americans. Some of us have congressional districts that are a majority white as opposed to being majority black. And we don't presume that we can speak for all white Americans, either, by virtue of that in our districts.

What we do, I think, claim is this. We are not self-appointed or self-acclaimed leaders. Every 2 years, we do what you have to do in the Senate every 6 years, and that is go back to the people and get elected again. We go back every 2 years. We get elected, and we represent individually 550,000 people. So collectively, there are 26 of us representing 550,000 people, both black and white, who go to the polls and vote for us.

So to that degree, we think we speak for those people to whom we go back every 2 years with a record, and they then vote upon us to return to the Congress based upon that record.

Mr. OWENS. Senator, I don't want to be redundant. I want to say pretty much the same thing. There are a lot of people who trivialize and try to minimize the importance of elected officials, but as one fellow elected official to another, you know what we go through to get elected, and you know that those of us who are in office through this process do represent the majority of the people in our districts. And some of us have been in public office for more than 20 years, so I think we speak not as self-appointed leaders, but we speak with great authority. And if you look across the country at elected officials not only in Congress but in State legislatures and city legislatures, you will find that the overwhelming majority of those elected officials feel the same way we do about the appointment of Clarence Thomas.

Mr. WASHINGTON. Senator, let me only add the point that I was attempting to make earlier and perhaps did not make clear enough. It is unnecessary to attack one person in order to state their point of view, so I would ask you to look with a jaundiced eye upon those, because we are elected, as are the Members of the Senate. The people that you are talking to are either anointed or appointed, but not elected; 25 of the 26 black Americans who have been elected by white, Hispanic, Asian, black, other people to the Congress of the United States have stated our position. That should not subject us to attack; they shouldn't attack the body politic because they disagree with the result.

The CHAIRMAN. Let me point something out, if I may, to my colleagues which I found interesting, I thought insightful, and I think

somewhat illuminating about what still amazes me after so many years of getting less than equal treatment in this country. Black Americans did what I suspect almost no one else would do. Upon the announcement of Mr. Thomas to be the nominee, notwithstanding the fact that he was black, over 60 percent of black Americans had an open mind—over 60 percent, from all the polls I read, said “We’re not sure; let’s see what he has.”

Now, I have not made my judgment on him yet, but I think that is astounding. Everyone likes to assume the point that you made, Congressman Washington, in such an articulate fashion, that you point out is not true—that blacks all think alike. Here, a black man was appointed to the bench, and almost two-thirds of black America said, notwithstanding that, “I am going to withhold judgment until I find out more about him.” I thought that was astounding and quite a compliment.

Mr. LEWIS. Let me just add, Mr. Chairman, I think you make the point that as American and as black American—I think as a people—we are very considerate. We are kind, we are compassionate, and we have a great deal of pride. And I think a lot of blacks supported Thomas when they heard that he had been nominated because they were proud of the fact that a black was nominated. And when they got more information, they started looking and moving the other way.

Another point I want to make is that the National Baptist Convention, which came out against Clarence Thomas, represents more than 10 million African Americans. The black church is probably the most powerful, most influential group in the African American community, and this is the largest black religious institution.

The CHAIRMAN. Senator Specter—oh, I’m sorry, I beg your pardon, Senator Grassley. I thought you were finished.

Senator GRASSLEY. I’m done, except I want to make one statement to clarify that the poll I referred to of 58 percent black Americans’ support for Thomas was taken the 13th to the 15th, so it was after he had been testifying before us for 4 days. So these people have had an opportunity to view his philosophy as well as just his name and who he is.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I join with my colleagues in welcoming you, our fellow members of Congress, to this hearing. The brief exchange between Senator Thurmond and this caucus, I think, was historical in a sense, and an underlying sense that touched some very, very important feelings.

The issue of affirmative action, I think, is a big one, and I have expressed before my regret that we didn’t do more about it substantively, but that’s what I would like to discuss with you gentlemen for a few minutes today.

I believe that these hearings have had the benefit of having people focus on a substantive issue, not as much as I would have liked, but Judge Thomas has advocated a position in opposition to affirmative action on the grounds that as to the minorities which it purports to help, that he feels that it is in fact harmful. He feels it fosters a notion that the minorities are disabled, fosters a notion that the minorities are in need of handouts and takes away self-

respect. As to those who are in the majorities who are displaced, there is a sense of resentment, of unfairness, of being displaced by individuals with lesser qualifications. And he articulates a view that there is a significant increase in racial divisiveness.

Now, he has articulated these views in the context of an individual who has pulled himself up by his bootstraps or—perhaps not by his bootstraps, because some say he had no boots—by his kneecaps, who has become a very prominent individual, and perhaps more than any African-American since Justice Thurgood Marshall—aside from athletes, and there is the big concern about whether athletes are too much a role model in our society. But he has thrust himself on the national scene in a way that no African-American has in modern times as a role model and articulating a view of self-help, really sort of rugged self-help.

The comment that I'd like to ask you to make is in response to two questions. One is even if you don't agree with this articulation of opposition to affirmative action, doesn't it have a reasonable basis? And secondly, doesn't Judge Thomas have the potentiality to be a real vibrant role model for African-American youngsters who won't understand the nuances of the *Griggs* case or the *Johnson* case or local 28, or don't know all the things that have happened in this hearing room, but simply see an African-American who has attained tremendous stature by pulling himself up with his own energies?

Congressman Conyers, may we start with you?

MR. CONYERS. Yes, I am delighted to respond to your question, Senator Specter, because I am sure at this stage of the hearing we must all know that he was a beneficiary of affirmative action as much as anyone has ever been in the country. And what I find ironic is that after Yale University Law School, which used affirmative action and was happy to bring him in, and he succeeded well, that we find now that he doesn't think other people should use that same method.

That seems to me to refer to the kind of character that I'm not really particularly proud of. I didn't like the reference that he made, speaking of how much role model he is going to be, about his sister who worked very hard at a hospital and for one short period of time had to go on public assistance. He held that up as the spectacle of why he didn't like welfare. I was absolutely shocked to hear that.

So you won't hear me agreeing that he is a new role model second only to athletes which you and I rightly agree may be overvalued. I see him, as a matter of fact, doing exactly the wrong thing about the right strategy. When we talk about these legal systems of class action and affirmative action and patterns of practice, looking for result rather than intent, these may be legal theories that may slip unnoticed in the general public, but I think that they stamp him as the wrong guardian of constitutionally derived remedies that we are struggling so hard to get into effect and on the books.

Two of you have worked with us and members of the conference committee on the failed 1990 Civil Rights Act that was vetoed by a President who now threatens to veto yet another civil rights bill that we are toiling with. These kinds of principles to me, when I

think of Judge Thomas being elevated, I see more problem being created. I see us moving backward and not forward. And race won't help him there. A poverty-stricken background is of no use to us in what we think he is going to do based on what he has done in the past.

Senator SPECTER. Congressman Stokes.

Mr. STOKES. Thank you, Senator Specter.

The manner in which you have characterized the positions taken by Judge Thomas is what really frightens me about him. I think that for one who has been the beneficiary of affirmative action to say, "Now, I've got mine; you get yours the best way you can"; "It was okay for me, but you ought not have affirmative action"—that frightens me.

Black Americans and other minorities who are in need of affirmative action aren't really asking for anything special. All they are asking for, Senator Specter, is under our Constitution the guarantee of opportunity and equality that is given to all Americans under our Constitution. That is not asking for a handout. When the person who is discriminated against in the marketplace or in the employment place asks just to have an equal opportunity—not preference, not priority, just an equal opportunity to earn a decent living—that's not a handout.

It is Judge Thomas' attitude toward people who need relief, his attitude when he was head of the EEOC of trying to get away from class actions and reduce it down to individual action with the knowledge that what that did was to hurt the masses of cases—that is disturbing to me in the same way that Congressman Conyers has already mentioned.

A man who had the attitude he had toward his own sister and her children; the references that he made to them publicly before conservative black groups, while he made his points with the President and other conservatives, that this man can attack his own family. And it turns out that he really wasn't telling the truth about his sister. While she was on welfare at that time, and he was referring to the children as learning how to cheat now and so forth, later information came out that all of them really worked when they had an opportunity to do so.

But these are things that frighten me about him. I don't think, in the sense of a role model for black Americans, that a Judge Thomas will ever be the role model that a Thurgood Marshall is.

Senator SPECTER. Congressman Owens?

Mr. OWENS. I think the thinking that you have set forth as being the position of Judge Thomas with respect to affirmative action and blacks not receiving any special treatment is a very backward kind of reasoning, very limited, lacking in compassion, and basically dishonest to any black in America to take that position because there is a cornered reality which blacks in America live through every day.

All Judge Thomas needs to do is take off his suit and his tie and walk through 1 day of life in this city or anywhere else in the country and he will experience some things to let him know that blacks are treated in a very special way.

Prejudice and discrimination are a part of the reality of humankind all over the globe. We have all kinds of conflicts that people

set up or reasons that they set up to discriminate against each other. Often, when both groups are white it is religion or some other ethnic difference, but when you are dealing with blacks, you are dealing with people who are highly visible, and the degree to which discrimination is expressed against us is far greater.

And any black who says that we are just like everybody else and should never expect to have any kind of special treatment in order to overcome certain problems is basically dishonest. They are dishonest because of the current reality; they are dishonest because, as an intellectual, they want to disregard all of history.

Blacks are the descendants of African slaves who were brought here against their will, not like other immigrants. We were, for 300 years, treated as slaves and suddenly set free with very little or nothing to compensate. There was a social experiment called the Freed Man's Bureau. Thank God for that, because it created historically black colleges.

But, basically, nothing happened when the slaves were set free to deal with the problem that they had their labor stolen from them all those years. They had no property, et cetera, et cetera. So the whole concept of reparations has to enter into dealing with the descendants of African slaves today, but we refuse to accept that.

In every group, there is a certain percentage who will overcome and excel no matter what the conditions are, no matter how great their pressure. There is a certain percentage who will overcome. The majority of the people are just normal human beings; they will not be able to overcome without some special help.

We accept the principle of reparations in the case of war. One nation loses a war; they have to pay. We also accepted it in the case of Israel and the Jews under the Nazis. We went one moral step further, and oppressed people who had not won the war were paid reparations by the Germans because of the conditions they subjected those people to during the course of the Nazi period.

I am not asking for reparations in the payment of dollars to individual blacks, but some consideration of what—300 years of slavery, followed by years of de facto discrimination that impact on a people has to be taken into consideration.

Any person, black or white, who is an intellectual and knows history and wants to disregard this totally, I find, you know, either naive or basically dishonest, and I think in the case of Judge Thomas it is basic dishonesty.

Senator SPECTER. Well, my time is up, Mr. Chairman. May the answers continue?

The CHAIRMAN. Yes.

Mr. WASHINGTON. I will be brief in my response, not to say that the others weren't, of course, because they are senior to me.

The first question you asked is about—you ran off a litany of things dealing with—and you arrived at the correct assessment that we are dealing with, unfortunately, a period of more racial divisiveness in this country than any of us would think ordinarily possible in 1991; that we were on a course where things were getting better. Now, it appears that things are either standing still or moving backwards.

And the question you raised, as I understood it, Senator, had to do with Judge Thomas' views about affirmative action vis-a-vis

that, and the question was does his position have a reasonable basis. The answer to that question is no because it misappends, if you will, the very touchstone of what discrimination is.

Judge Thomas' view is that whatever has happened to him, good or bad, has happened to him as an individual. Nothing could be farther from the truth. Prejudice is prejudice because of group identification. People can't prejudge you if they don't know you, except either you are too tall, Senator Simpson, or you are too short or you are too black or you are too this or you are too that, based upon group identification.

It oversimplifies and overlooks the fact that, as my colleague has said, the prejudice that is visited upon black people or Hispanics or any other group of individuals is born of someone having categorized them as being not as qualified to have the job. So, that is not going to go away.

If you did away with all affirmative action, then there are white people and black people and Hispanic people and all kinds of people who think that the view of the sunset is somehow enhanced if they are standing on somebody else's shoulders. Nothing is going to change about that. There are always going to be white people who think the black guy got the job because he was black rather than because he was qualified.

We as leaders have to ensure that regardless of how we feel about these laws, if these are laws on the books that are bound to be enforced that overcome the vestiges of past discrimination, we can't play political cannon fodder with them, it seems to me. We lend ourselves to that kind of notion when we get out and play politics with notions about job discrimination and the like.

We know that Griggs decided that there would be remedies available to overcome the built-in headwinds as long as the headwinds continue to exist for women or for Hispanics or for—one of these days, it is going to be for white males. A majority of people in this country are not going to be white males forever. Demographers already tell us that. So when you become the minority, then will the built-in headwinds be opposing you? I think so.

In answer to the second part of the question of does he have the potential to be a role model, he has the same potential as in Rudyard Kipling's admonition in the poem, "he travels the fastest who travels alone"—"when by the aid which he has done and the aid his own which he has done, he travels the fastest who travels alone." That is the role model he presents. He presents a role model that if you want to get ahead in life, don't come up through the ranks the same way that you and all the rest of us do; get in the short line.

That is exactly what he has done. He went over, he looked at the line over here on this side, and he said that the line of black people who want to move up is shorter over there, so he got in the short line, and that is the role model that he presents for black Americans, I think.

Mr. LEWIS. Senator, let me just state that in spite of all of the changes, in spite of all of the progress that we have made in this country during the past few years, the scars and stains of racism are still deeply embedded in American society. So there is still a need for affirmative action. I think you have a nominee who would

like to destroy the bridge of affirmative action that brought him across. He is forgetting those that have been left out and left behind.

And on the question of a role model, I think we want someone who is going to be a headlight rather than a taillight when it comes to the issue of simple justice and simple fairness. Is this man the type of role model that we want for our children, someone who is defiant, evasive and inconsistent? It is not a role model I want for my son.

Senator SPECTER. Thank you very much, gentlemen. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, I just want to thank my fellow legislators for coming. I appreciate that, and I do understand your terribly deep concern. I am sure that the deliberations within your caucus were very spirited because I know more than several members of your caucus, and quite well, and I enjoy my work with you as legislators. We have been on conference committees together, and panels and forums, and that has been an opportunity for me to know you better.

And so, you know, I know that it was a spirited discussion you had in your caucus. We are going to have another group before us today, black lawyers, where the vote on Clarence Thomas was 113 to 104. That is reality in this one. The black community is split for the first time in my memory here on this panel. It is very real, and I understand that and it is troubling to you.

And the things you talked about, the EEOC and comments about the sister and the affirmative action—all of those things were addressed by the nominee. The sister sat right here with him for 5 days—an example of family affection. The mother, the son—all those things have been covered; all parties have been treated fairly.

No one is going to be shut out, but it seems to me that it is the diversity of thought and philosophy of this man that is the fear, the real fear. That is a terribly presumptuous statement of mine because there is no way I can even identify. But I do think that it is unfortunate to see sometimes a white legislator telling a black person how a black person should feel. I don't like that one. I bet you don't like it either.

So this is not the usual black conservative; that is not who this Clarence Thomas is, and that is why he has got to be a big puzzle to you and somewhat to us. But I don't think he is dishonest. I think he is fair, I think he is compassionate, and I think he is sensitive. I think he is going to be a tremendous addition to the Supreme Court and he is going to surprise everybody.

Craig, I heard what you said about you and I have to buy our shirts in a separate place. We have a wingspread of about 37½ inches. And we are different, but I enjoy you and admire you greatly. John Conyers and I have had some tough words back down the line, and I respect him. We have been on conferences. I know Congressman Stokes somewhat, but Kweisi Mfume and Don Payne, and you have got a lot of wonderful people in your group. And so here we go. We will just try to do our best.

I really don't have any questions, but I can certainly understand the anguish and the heavy concern that you have. I have no questions.

The CHAIRMAN. Thank you, Senator.

I am sure that one thing the five Congressmen and I share in common is that if—if—Clarence Thomas is approved by the Senate and goes on the Court, it will be our sincere hope that he does surprise you. You, personally. We hope when you are on the Court you and the President are having lunch someday, and you will say, Oh, my Lord, what have we wrought. [Laughter.]

Senator SIMPSON. Mr. Chairman, you were gone from the chamber off and on for several minutes, and Orrin and I were going to take over this committee. So think how lucky you were. I can assure you that he will surprise me.

The CHAIRMAN. I am sure that day may come again when you all take over the committee. Hopefully—by that time, I will have no hair, but maybe not. It is going rapidly. I am doing my best.

At any rate, I want to thank you. I think it was Congressman Conyers who mentioned his sister. We will enter in the record—but I think I am not mistaken when I say this—I am not making the comment relative to Thomas himself, but relative to his sister who did sit here the whole time. She is a remarkable woman. As I understand, this woman held down two minimum-wage jobs and had an aunt who was taking care of her children while she could hold these two minimum-wage jobs. The aunt became ill. Only when the aunt became ill did Clarence Thomas' sister—again, I don't care what Clarence Thomas said about it. I am not talking about his comment, but just because her name has been mentioned a number of times.

As I understand it, only when the aunt became ill and could no longer take care of her children during the day while she worked her two minimum-wage jobs did she have to quit, get relief for a period of time until she could rectify the situation and then went back to work at a local hospital and has worked since then. Quite a remarkable woman.

Quite frankly, I have no reason to doubt it. I have heard nothing to controvert what I have just said. I may have one of the details off, but that is the essence of it at a minimum. We will put in the record precisely what the situation is. But I kind of always thought that was the reason why we had public assistance, for people who had no choice.

I don't know many Americans who like working at all. A lot of them would work in that circumstance two minimum-wage jobs. Well, that is not true. There are tens of thousands who do it and have to do it. But at any rate, not just because you mentioned it, John, but her name has been mentioned off and on for the last 7 days, and I just think the record should note she is a remarkable person facing the struggle that tens of thousands of Americans have faced in their lives, black and white.

Mr. CONYERS. Mr. Chairman, on behalf of all us here, we want to thank this committee for the unusual amount of time that has been afforded to us to exchange these views. We are very grateful for that.

The CHAIRMAN. Simply stated, you are important. Simply stated. It is a simple fact of life. And I thank you for all coming over. You have lent a great deal to this deliberation and given us all something to think about. I am just delighted in my very short years of practice before coming to the Senate at age 29 that I was not on the other side of a case in the courtroom with you, Congressman Washington. I now know why you were a successful trial lawyer.

Having said that, let me thank you all again for being here, and we will continue to seek your counsel on many other things. And, John, look over the crime bill.

Mr. CONYERS. Thank you. May we be excused?

The CHAIRMAN. You may be excused. Thank you.

[The prepared statement of the Congressional Black Caucus follows:]



John Coopers, Jr. MI 65  
 William Clay, MO 69  
 Louis Stokes, OH 69  
 Ronald V. Dellums, CA 71  
 Charles B. Rangel, NY 71  
 Cuyler Collins, IL 73  
 Harold Ford, TN 74  
 Julius C. Dixon, CA 79  
 William H. Gray, PA 79  
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 Gus Savage, IL 81  
 Maxon R. Owens, NY 83  
 Edolphus Torres, NY 83  
 Alan West, MO 83  
 Charles A. Hayes, IL 83  
 Mike Espy, MS 87  
 Floyd H. Flake, NY 87  
 John Lewis, GA 87  
 Akeem M. Fields, MD 87  
 Donald M. Payne, NJ 89  
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 Barbara-Ann Collier, MI 91  
 Gary Franks, CT 91  
 Eleanor Holmes-Norton, DC 91  
 Wabian Jefferson, LA 91  
 Maxine Waters, CA 91



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 Secretary  
 Charles Hayes  
 Treasurer  
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 CBC Whip

**STATEMENT OF THE CONGRESSIONAL BLACK CAUCUS  
 ON THE NOMINATION OF JUDGE CLARENCE THOMAS  
 AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT**

September 19, 1991

Introduction

It is a special pleasure to testify before our friends and colleagues on the Senate Judiciary Committee. Representatives of the Congressional Black Caucus have testified at Supreme Court confirmation hearings before, and we truly appreciate this opportunity to once again express our views on a vitally important nomination.

Although as Members of the Congressional Black Caucus we represent substantial numbers of African Americans, as Members of Congress we also represent whites, Hispanics, Asians, Native Americans, older Americans, people with disabilities, and Americans of every stripe. It is on behalf of all Americans that we oppose the nomination of Judge Clarence Thomas for a seat on the United States Supreme Court.

Our members have been chief sponsors of every piece of legislation touching on civil rights and liberties, women's rights, and equal opportunity for a quarter of a century. A large number of our members serve on the House Education and Labor Committee and several others serve on the Judiciary Committee, the two committees which have the major responsibility for overseeing the agencies and laws Judge Thomas was responsible for.

Judge Thomas has testified before Congressional committees 56 times (55 published; 1 unpublished). Yet this extraordinary number of appearances is not reflective of a long tenure in public service or governmental office, and very few of his appearances were routine.

In fact, most of those appearances stemmed from controversies in which he was involved and reflected the exasperation of House Committees with his administration of the law. The publication of an unusual number of General Accounting Office (GAO) reports, most of them highly critical of the nominee's administration of the laws under his jurisdiction, underscore this view.

After carefully examining the Thomas record, we have concluded that during his government service Judge Thomas failed to carry out his constitutional obligation to his oath of office

to enforce the laws of the land. Moreover, Judge Thomas exhibited a pervasive disrespect for Congress and the legislative process. It is our belief that his disregard for legal precedent and the rule of law undermines his privilege to a seat on the Supreme Court.

The Supreme Court belongs to all Americans. More than any other, it is the institution that curbs excesses by other government bodies, that safeguards the rights and liberties of every citizen, and that serves as a unifying force, enabling our nation to survive as a constitutional democracy longer than any other.

Beyond this tie that all citizens have to the Supreme Court, however, the Court has a special significance to African Americans. Throughout our nation's history, the actions of the Supreme Court have had a powerful influence on the lives of African Americans -- for better or worse. During the 19th century, the Supreme Court first decided that African slaves were property with no rights that a white man was bound to respect. Then, after the Civil War, the Supreme Court helped bring an end to Reconstruction, with decisions that gutted original civil rights laws and imposed the judicial invention of "separate but equal."

In contrast, in the latter half of the 20th century, the Supreme Court's interpretations of the Constitution have provided African Americans with long overdue freedom. The Supreme Court's decision in Brown v. Board of Education and subsequent civil rights cases helped rid the nation of the scourge of "Jim Crow". These decisions created conditions in which African Americans could improve their economic, social, and political status. Without the Supreme Court, it is doubtful that most Members of the Congressional Black Caucus would be in Congress, that General Colin Powell would be Chairman of the Joint Chiefs of Staff, or that Judge Clarence Thomas would be a nominee to the Supreme Court.

No one individual is more responsible for the Supreme Court's contemporary role as the guardian for equal rights than Justice Thurgood Marshall. First as an advocate and then as a distinguished jurist, Justice Marshall is responsible for most of the great equal protection decisions of the past 40 years and for the legacy of opportunity that we are struggling to make tangible for millions of Americans. The nation's debt to Justice Marshall is enormous and can never be repaid.

The nominee before you has been offered by President George Bush as a worthy successor to Justice Marshall. As an African American and as someone who overcame humble beginnings, we are told, Judge Thomas will understand the needs of those who face similar struggles. Even if these claims were not made on Judge Thomas' behalf, it is inevitable that Judge Thomas will be assessed as Justice Marshall's successor.

Regrettably, when we examine the nominee's record -- not only his performance as a government official -- but his writings, speeches, and remarks over the past decade, it is clear that Judge Thomas is not a worthy successor to Justice Marshall. Our differences with the nominee do not stem merely from reasonable and understandable differences over particular cases or remedies. Rather, Judge Thomas repudiates the fundamental role of the Supreme Court as guardian of our Constitutional freedoms and rejects the legacy of Justice Marshall.

On behalf of 25 of the 26 members of the Congressional Black Caucus, we respectfully urge you to reject the nomination of the Judge Clarence Thomas.

## CONGRESSIONAL BLACK CAUCUS STATEMENT

### I. The Nominee's Failures to Enforce the Law and his Contempt for the Legislative Process

#### A. Failures at the EEOC

Two years ago, 14 members of the House of Representatives, including 12 chairs of committees having jurisdiction over the EEOC and five members of the Black Caucus, wrote to President Bush asking that Thomas not be nominated to the Court of Appeals.

After reviewing the record, the writers of the letter said that Thomas had "resisted Congressional oversight and been less than candid with legislators about agency enforcement policies." They concluded that he had demonstrated an "overall disdain for the rule of law and that his record as "EEOC Chair sends a clear message to those who have suffered job discrimination that he is insensitive to the injustice they have experienced."

These were harsh conclusions, but they are based on a well-documented record, including the following:

- o As Chair of the EEOC, Thomas persistently refused to use the mechanisms provided by law after Congress earmarked funds specifically for this type of enforcement and threatened to cut the budget for the office of the Chair and members of the EEOC. In 1985, 40 members of Congress wrote to Thomas expressing "grave concern" over EEOC's failure to pursue class action cases.<sup>1</sup> This refusal to use the one mechanism that has been essential to the elimination of discrimination flows directly from Judge Thomas's personal view that "group remedies" are inappropriate.
- o Also underlying Thomas's refusal to pursue systemic cases was his opposition to the employee selection guidelines. These guidelines were the bases for the Supreme Court's unanimous decision in Griggs v. Duke Power Company in 1971 holding that employer practices that had a disparate impact violated Title VII unless justified by business necessity. The guidelines and Griggs were the bases of great progress in equal job opportunity in the 1970s. When Thomas was thwarted in his effort to repeal the guidelines, he simply refused to enforce them, leaving EEOC to file only the kinds of cases "that employers write off as the cost of doing business."<sup>2</sup>

<sup>1</sup> See The Washington Post, July 9, 1985, p. A1.

<sup>2</sup> See interview with Michael Middleton, St. Louis Post Dispatch, February 26, 1989, p. 1B.

- o Despite a Supreme Court decision specifically endorsing goals and timetables and the failure of a Meese-Thomas effort to repeal the Executive Order authorizing such remedies, Thomas declared in 1986 that EEOC had abandoned the remedy and would no longer approve settlements involving the use of such goals.<sup>3</sup>
- o Through indifferent and negligent administration, Thomas allowed some 13,000 claims under the Age Discrimination in Employment Act to lapse without action, requiring special legislation by Congress to restore individual rights.<sup>4</sup>
- o As Chairman, Thomas also failed to enforce the age discrimination law in dealing with the obligations of employers to make pension contributions for workers over the age of 65. Thomas dragged his feet, allowing employers to freeze the pension accounts of people who worked beyond the age of 65, even after Congress had clarified the law and a federal court had held that EEOC delays were "entirely unjustified and unlawful, at worst deceptive to the public."<sup>5</sup> Thomas only backed down after further Congressional pressure and objections from the IRS.
- o During his years at the EEOC, Thomas failed to challenge gender-based wage discrimination, embracing an analysis by Thomas Sowell that asserts that women prefer jobs that pay less and that black women fare better in the labor force than white women.<sup>6</sup>

#### B. Failures at the Department of Education

The nominee's record as a lawless administrator at the EEOC is of a piece with his defaults in his previous post - as director of the Office of Civil Rights in the Department of Education.

There, he made startling admissions at a 1982 hearing in federal district court concerning charges that his office had violated court-ordered requirements for processing civil rights cases.

Q: And aren't you in effect -- But you're going ahead and violating those time frames; isn't that true? You're violating them in compliance reviews on all occasions, practically, and you're violating them on complaints most of the time, or half the time; isn't that true?

A: That's right.

<sup>3</sup> The Washington Post, July 24, 1986.

<sup>4</sup> See letter from Rep. Edmund Roybal, Chair, House Select Committee on Aging, to Senators Biden and Thurmond, July 16, 1991.

<sup>5</sup> AARP v. EEOC, 655 F. Supp. 228, 229 (D.D.C.), aff'd in part, rev'd in part on other grounds, 823 F.2d 600 (D.D.C. 1987).

<sup>6</sup> See Report of the Womens' Legal Defense Fund, pp. 40-42; Thomas "Thomas Sowell and the Heritage of Lincoln; Ethnicity and Individual Freedom," 8 Lincoln Review no. 2 at 15-16. (Winter 1988).

Q: So aren't you, in effect, substituting your judgement as to what the policy should be for what the court order requires? The court order requires you to comply with this 90 day period; isn't that true?

A: That's right.

Q: And meanwhile, you are violating a court order rather grievously, aren't you?

A: Yes.<sup>7</sup>

Following the hearing, Judge Pratt concluded that while there had been some problems in past administrations with compliance, the difference between David Tatel (Thomas's predecessor) and Thomas "is the difference between day and night."<sup>8</sup> Judge Pratt found that the court's order had "been violated in many important respects" and that under Thomas, the view was that "we will carry out [civil rights statutes] in our own way and according to our own schedule."<sup>9</sup> This episode is hardly comforting when we consider that a justice must himself respect and follow the law.

### C. The Nominee's Disrespect for the Legislative Process

The failures by Judge Thomas to enforce the civil rights laws he was responsible for administering have been matched by unprecedented expressions of hostility toward Congress for scrutinizing and criticizing his agency's performance.

For example, in its effort to deal with the lapsed complaints under the Age Discrimination Act, Congress was continually frustrated by misrepresentations made by Thomas about the severity of the problem, leading the Senate Special Committee on the Aging to find that:

"The EEOC misled the Congress and the public on the extent to which ADEA charges had been permitted to exceed the statute of limitations."<sup>10</sup>

Yet, the moral drawn by the nominee from this episode, in which the rights of older people were restored only through painstaking investigation and corrective action by Congress, was that Congress was at fault. He said:

"My agency will be virtually shut down by a

<sup>7</sup> Transcript of hearing in WEAL and Adams v. Bell, Civ. Action 3095-70 (D.D.C. March 12, 1982) at 48, 51.

<sup>8</sup> Adams transcript, March 15, 1982.

<sup>9</sup> Id.

<sup>10</sup> Report of the Senate Special Committee on Aging (unpublished), 100th Congress, 2d Sess., 1988, pp. 36-37. Senator Pryor, the current Chairman of the Committee, has made it clear that the misrepresentations were those of Clarence Thomas, stating that "I was dismayed to learn about several erroneous statements made by Chairman Thomas... Those statements are certainly misleading..." Cong. Rec. S 1542 (daily ed. Feb. 22, 1990).

willful Committee staffer who has succeeded in getting a Senate Committee to subpoena volumes of EEOC records... Thus a single, unelected official can disrupt civil rights enforcement --- and all in the name of protecting rights."<sup>11</sup>

This hostile, unresponsive treatment of any Congressional criticism of his performance was repeated by Mr. Thomas on many occasions. In 1988, the General Accounting Office issued an audit report in response to a request from now retired Congressman Augustus Hawkins, then Chairman of the House Committee on Education and Labor, to look into EEOC's record of investigating and settling complaints. The GAO report set out facts showing a mounting backlog, delays in investigation and a decrease in the average amounts of settlements.<sup>12</sup>

Thomas's reply was to cast doubts on the independence and integrity of the GAO, complaining that the report was a "hatchet job" and adding that:

"It's a shame Congress can use GAO as a lap dog to come up with anything it wants..."<sup>13</sup>

On other occasions, the nominee has offered the following opinions of Congress and the legislative process:

- o Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom."<sup>14</sup>
- o "Congress is no longer primarily a deliberative or even a law making body."<sup>15</sup>
- o As EEOC Chair, he was "defiant in the face of some petty despots in Congress."<sup>16</sup>

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<sup>11</sup> Speech to the Federalist Society at the University of Virginia, March 5, 1988, p. 13.

<sup>12</sup> GAO Report HRO-89-11 (October 1988).

<sup>13</sup> The Los Angeles Times, October, 11, 1988.

<sup>14</sup> Speech to the Federalist Society at Harvard University, April 7, 1988, p. 13.

<sup>15</sup> Speech at Brandeis University, April 8, 1988, p. 4.

<sup>16</sup> Speech at Harvard University, supra note 14 at p. 13.

- o A committee request for semi-annual reports on the EEOC's work was an "intrusion into the deliberations of an administrative agency."<sup>17</sup>
- o "As Ollie North made perfectly clear last summer it is Congress that is out of control." (emphasis in original)<sup>18</sup>

Our concern is not that Thomas engaged in spirited discussions in public or with members of Congress. We are all accustomed to the rough and tumble of legislative and political debates and we can take it as well as dish it out.

Rather, something of more fundamental importance is at stake here. Faced on many occasions with facts indicating that his agency was not enforcing the law, Clarence Thomas chose neither to promise improved performance nor to engage in a substantive discussion of the legislative and administrative issues. He elected, rather, to challenge the legitimacy of the legislative process and the good faith of those who are a part of it.

Even without more, the Thomas record of disdain for law should be viewed as a disqualifying factor in his quest for a seat on the Supreme Court. His actions and utterances should also set off alarm bells in this Committee about what may be expected of Judge Thomas should he be confirmed. We will discuss these concerns more fully later in this testimony.

## II. The Nominee's Repudiation of the Role of the Supreme Court as Guardian of Constitutional Rights and Liberties

Supporters of Clarence Thomas's nomination seek to portray opponents as people who disagree with the nominee about "busing" and "quotas." This caricature of the opposition is both crude and inaccurate. An examination of the nominee's writings and speeches makes it abundantly clear that he quarrels not just with a few decisions or remedies but with the great body of equal protection jurisprudence that has made progress possible in the latter half of the 20th century.

A. The Nominee's Attack on Court Interpretation of the Voting Rights Act. In 1988, Judge Thomas assailed Supreme Court decisions applying the Voting Rights Act, with the following words:

"The Voting Rights Act of 1965 certainly was

<sup>17</sup> Speech at Harvard University, supra note 14 at p. 13.

<sup>18</sup> Speech to the Federalist Society at the University of Virginia, March 5, 1988, p. 13.

crucial legislation. It has transformed the policies of the South. Unfortunately, many of the Court's decisions in the area of voting rights have presupposed that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has sufficient clout."<sup>19</sup>

Elsewhere, the nominee has attacked the 1982 amendments to section 2 of the Voting Rights Act on which the court decisions were based as "unacceptable".<sup>20</sup>

The decisions referred to by Judge Thomas presumably are White v. Register, 412 U.S. 755 (1971) and Thornburg v. Gingles, 478 U.S. 30 (1986). The latter decision implemented the 1982 amendments to section 2, which prohibits election laws and practices with a racially discriminatory effect. The most important application of this prohibition is to forbid schemes that dilute minority voting strength. As the NAACP Legal Defense Fund has written:

"Judge Thomas's criticism of section 2 and the related Supreme Court cases reflects a fundamental misunderstanding of the law. Neither section 2 nor those decisions, assume that whites or minorities vote in racial blocs; in a section 2 case like Gingles the burden is on the plaintiff to adduce evidence proving that racial bloc voting does occur in the jurisdiction at issue. Where that, in fact is the case, the individual's right to vote as well can be rendered meaningless by a system which assures that the candidate supported by black voters has no chance whatsoever of actually being elected."<sup>21</sup>

In 1981 and 1982 we in the Black Caucus worked with many members of this Committee to craft amendments to the Voting Rights Act that would provide a meaningful opportunity for minority citizens to elect candidates of their choosing. At the same time we specifically eschewed in the statute any notion of "proportional representation" or "group rights."

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<sup>19</sup> Speech at the Tocqueville Forum, April 18, 1988, p. 17.

<sup>20</sup> Speech to the Heritage Foundation, June 15, 1987, p. 10; Speech at Suffolk University, Boston, March 30, 1988, p. 17.

<sup>21</sup> NAACP Legal Defense Fund, "An Analysis of the Views of Clarence Thomas," August 13, 1991, p. 5.

Our work is surely not beyond criticism, but for the nominee to caricature both the statute and the Court's interpretation of it as he has, betrays both his failure to understand the issues and his persistent rejection of the role of the judiciary in protecting rights established by the Constitution or the Congress.

**B. Equal Employment Opportunity and Affirmative Action**

For more than a decade, the Supreme Court has struggled to balance fairly the interests involved in affirmative action cases. While recognizing a need to go beyond formalistic declarations of good intentions by employers, the Court has sought to assure that the interests of already-employed white workers were not "unduly trammelled" by affirmative action policies. While recognizing that race-conscious remedies ordinarily must be based on the need to overcome a history of past racial discrimination or exclusion, the Court has recognized the utility of voluntary agreements that avoid contentious litigation about liability.

Thoughtful observers on all sides of the issue have not been reluctant to criticize the Court for "going too far" or "not going far enough" on a given matter, but their criticism has been tempered by an appreciation of the complexity of the issues, the need to discern legislative intent that is not always evident and the need to be fair and equitable.

That is what one might have expected of Clarence Thomas, given his position at the EEOC and presumed expertise. Instead, Mr. Thomas has approached affirmative action issues with an elephant gun, using overblown rhetoric instead of careful analysis. His attack on affirmative action remedies has been across-the-board and all-encompassing. Unlike some proponents of judicial restraint, he gives no deference to the will of the majority as expressed in Congressional legislation (Fullilove),<sup>22</sup> nor would he permit private employers to act voluntarily to remedy their past practices (Weber and Johnson).<sup>23</sup> And he would restrain the authority of courts to order race-conscious remedies even in the most aggravated cases of discrimination. (Sheet Metal)<sup>24</sup>

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<sup>22</sup> Fullilove v. Klutznick, 448 U.S. 448 (1980).

<sup>23</sup> United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

<sup>24</sup> See, e.g. Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

The intemperate language used by the nominee in his attacks is instructive. The Weber case involved a voluntary effort to deal with the long-standing exclusion of black workers from the steel industry, and Johnson a voluntary effort to deal with entrenched patterns of gender discrimination in county government.

Yet in Mr. Thomas's lexicon, the facts did not matter. Weber was "the egregious example"<sup>25</sup> of Court misinterpretation of legislative intent. Johnson was "just social engineering and we ought to see it for what it is."<sup>26</sup>

Most disconcerting, if one expects a Supreme Court justice to be committed to the rule of law and to give weight to the doctrine of Stare Decisis, is the nominee's statement that he hoped that the dissent in Johnson:

"will provide guidance for lower courts and a possible majority in future decisions."<sup>27</sup>

As for the Fullilove decision, upholding Congress's effort to provide a remedy for the long-standing exclusion of minorities from opportunities to become government contractors, Thomas said:

"Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside law the Court upheld in Fullilove v. Klutznick."<sup>28</sup>

Concerning the Griggs decision, Thomas declared:

"We have permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as

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<sup>25</sup> Speech to Cato Institute, October 2, 1987, p. 7.

<sup>26</sup> The New York Times, March 29, 1987, p. 1.

<sup>27</sup> Cato Speech, supra note 25 at pp. 20-22.

<sup>28</sup> Thomas, "Civil Rights as a Principle versus Civil Rights as an Interest," Assessing the Reagan Years (CATO Instit. 1988) at p. 391, 396.

adverse impact."<sup>29</sup>

His reference of course was to a decision not grounded in abstract theory, but in a practical recognition that minorities would have an opportunity for economic advancement only if barriers to employment that were not related to ability to do the job were removed. This Committee knows as well as we do that the progress that black workers have made in becoming police officers, firefighters, skilled construction workers, and over-the-road truckers, to name but a few, is due to the liberating effects of the Griggs decision that Clarence Thomas scorns.

The blunderbuss approach that the nominee has taken to equal employment and affirmative action decisions and his failure to make fundamental distinctions, created serious problems. After the Supreme Court's 1984 decision in the Stotts case holding that white workers with seniority could not be laid off before less senior minority workers in order to protect an affirmative action plan, Thomas argued that the decision had to be applied to invalidate affirmative action in hiring and promotions as well.<sup>30</sup> He was forced to abandon this transparent rationale when the Court upheld the use of goals and timetables<sup>31</sup> and then reverted to an explanation based on his "personal disagreement" with the Supreme Court's approach.<sup>32</sup>

C. Equal Educational Opportunity. The nominee has challenged the reasoning of the seminal case of Brown v. Board of Education; but far more important, he has criticized as a "disastrous series of cases" the Supreme Court rulings that gave real content to the Brown decision.<sup>33</sup> One decision he has singled out for criticism is Green v. County School Board of New Kent County. In that case, the Court held unanimously that "freedom of choice" plans under which children remained segregated unless black

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<sup>29</sup> Speech to Cascade Employers Association, March 13, 1985, p. 18.

<sup>30</sup> Firefighters v. Stotts, 467 U.S. 561 (1984); Washington Post editorial, "Goals and Timetables and the EEOC," (July 25, 1986).

<sup>31</sup> See, e.g. Local No. 93, Firefighters v. Cleveland, 478 U.S. 501 (1986).

<sup>32</sup> Thomas, "Principle v. Interest," supra note 28 at 397.

<sup>33</sup> Thomas "Principle v. Interest," supra, note 33 at 393.

parents and children risked the consequences of requesting transfer, were inadequate unless actual desegregation occurred.

Thomas complained that Green went too far because it "not only ended segregation but required school integration."<sup>34</sup> In that criticism, offered in 1988, he echoed the views of two other judges, Parker and Haynesworth, who took the position that the Brown case implied no affirmative obligations, but only a duty to cease formal segregation. Those judges (both of whom were rejected at different times by the Senate for a seat on the Supreme Court) spoke many years ago before the Supreme Court had addressed the question of remedy.

Judge Thomas's criticism should be clearly understood. It is not an attack on busing, for in the Green case, desegregation would have brought less busing not more since children were being bused for purposes of segregation. Rather, the Thomas view is that the demands of the Fourteenth Amendment should be considered satisfied by a formal disavowal of segregation, even if no desegregation actually follows. To do more, apparently, would be to validate the idea that separate is inherently unequal, a premise that Thomas disputes.

If the view that Judge Thomas urged in the 1980s had prevailed earlier, Brown might have become little more than a formal exercise and millions of children, who like Mr. Thomas grew up black and poor in the South, would never have had an opportunity to escape the yoke of segregation. This is not a vision that black Members of Congress can accept in a Supreme Court justice.

D. The Nominee's Disdain for the Role of Courts in Protecting the Poor and Disadvantaged. In 1986, Mr. Thomas joined in a report of the White House Working Group on the Family. The report condemned a series of Supreme Court decision as having "crippled the potential of public policy to enforce familial obligations, demand family responsibility, protect family rights or enhance family identity."<sup>35</sup> Among the decisions condemned was that in Moore v. City of East Cleveland.<sup>36</sup> In that decision, the Court overturned the jail sentence of the grandmother who had been prosecuted and jailed for refusing to evict the 10

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<sup>34</sup> Id.

<sup>35</sup> The Family: Preserving America's Future (1986).

<sup>36</sup> 431 U.S. 494 (1977).

year-old grandson for whom she had cared since infancy, when his mother had died. The city insisted that because he shared his grandmother's home with a cousin, the 10 year-old was an "illegal occupant." The presence of two grandchildren in her household violated a local ordinance, which limited the definition of a family to exclude "cousins."

According to the White House Task Force in which Clarence Thomas participated, and whose report he signed, the Court was wrong to interfere with Ms. Moore's eviction and jailing by declaring the eviction unconstitutional. The Report accused the Supreme Court of improperly intruding on the right of the municipality "to define 'family' in a traditional way" in zoning for single-family occupancy. The Report denounces the Moore case as among the Supreme Court decisions that question whether "the family... retains any constitutional standing."<sup>37</sup>

It is clear from Justice Powell's decision in Moore that the opposite is the case -- that the decision is based on the special constitutional status of the family. Indeed, as Justice Brennan noted in a concurring opinion, the ordinance if upheld would have had a devastating impact on many black families.<sup>38</sup>

The emphasis now being placed on the nominee's life story as one of his qualifications for the Court makes his view of the Moore case especially ironic. Having been raised by his grandfather, he nevertheless joined a report that would have resulted in the rending of many extended families. From the evidence it appears that his ideological opposition to the role of the courts in protecting rights and liberties overrides concern about the tragic consequences that may flow from such a commitment. Whatever the reason, the nominee's position on the Moore case should give pause to anyone who believes that once on the Court, Thomas's own experience will make him sensitive to the plight of minorities and the poor.

### III. The Impact of the Nominee's Philosophy and Approach on the Public Interest

What emerges from an examination of the nominee's career is a disturbing pattern of disdain for law, disrespect for the legislative process under which he was required to function during his tenure in government, and a sweeping repudiation of

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<sup>37</sup> The Family, *supra* note 35 at p. 11.

<sup>38</sup> 431, U.S. 494, 508-10, (Brennan J. concurring).

the role of federal courts in protecting the rights and liberties of people from the dangers of government excess.

There are other aspects of Mr. Thomas's judicial philosophy that may bear scrutiny, but we are speaking here of threshold concerns that are of fundamental importance. If a nominee's approach to his judicial duties is not grounded in an understanding and respect for the historic and constitutional roles of the major institutions of government, it is of little consequence whether he styles himself a believer in natural law or of some other theory of rights. He will simply lack the understanding of constitutional processes and the commitment to equality before the law that are central to the job of a justice of the Supreme Court.

These are not abstract matters; they have implications for all of us. Over the course of the last decade, on at least a dozen occasions, we in the Congress have been called upon to correct through legislation the Supreme Court's misinterpretations of civil rights statutes that the Congress had previously enacted. In all of these cases the Court had so narrowly construed the law that rights or remedies we believed we had set out in the legislation were denied by a majority of the justices. In almost all of these cases the legislative effort to restore rights was successful.

But as you know well, these legislative struggles have not been without cost. Each time the issue has arisen we in the Congress and in the nation have been compelled to fight battles that most thought had been settled years ago. The legislative struggles have been attended by a rise in racial tensions and doubt about the nation's continuing commitment to equality of opportunity.

We are engaged in such an effort now with the Civil Rights Act of 1991, designed to restore the rule of Griggs V. Duke Power Company and to undo the harm to equal job opportunity done by several Supreme Court decisions. This has been a bipartisan effort and in 1990 more than 60 percent of the members of each House supported legislation to repair the harm caused by the Supreme Court's decisions. There are differences, of course, among us, but if there is one area of agreement in the Congress it is that once we do enact a law we want the Supreme Court to pay careful attention to the words used in that law, to the legislative intent reflected in our committee reports and to the national commitment to equality of opportunity that gave rise to our action. The Thomas record while in government requires a vote of no confidence that Clarence Thomas as a Supreme Court justice will follow the legislative intent reflected in the laws we enact.

In the first place, we know that Judge Thomas has expressed

strong disagreement with provisions of the Voting Rights Act and with Title VII as interpreted in the Griggs case. Perhaps more important, we know that the nominee has frequently expressed open contempt for the legislative process (speaking on more than one occasion of "run-amok majorities" and a "Congress that is out of control")<sup>39</sup> and that he felt free as an administrator to refuse to enforce laws with which he personally disagreed. What confidence then can we as legislators have that as a Justice he will interpret the laws as the Congress has written them?

Our point should be clearly understood. It will not take a William Brennan or a Thurgood Marshall to meet the needs that are expressed here. Jurists such as Felix Frankfurter and John Harlan, the younger pursued with some consistency a philosophy of "judicial restraint," gave deference to legislative intent even when they disagreed with what the legislatures wished to accomplish. George Bush and his predecessor told us often that they wanted judges who would "adjudicate" not "legislate," but they have persistently nominated people to the Court who were prepared to upset longstanding interpretations of statutory law. From the record, it appears clear that confirmation of Clarence Thomas would continue the trend toward a Court that feels free to act as a super-legislative body in the area of civil rights and in other spheres as well.

The Nation already is paying a heavy price in conflict and disunity from the confrontations that the Court's new majority has provoked with Congress. In considering this nomination, we suggest that confirmation of this nominee may well exacerbate that trend.

#### IV. CONCLUSION

Finally, Mr. Chairman, as colleagues and friends we ought to be able to speak frankly to one another.

In this hearing you are considering a nominee with a personal history of overcoming poverty and discrimination, one that reflects a classical pattern in our communities, without of course, the opportunities and fruits of success Clarence Thomas has experienced. Despite that history, it is abundantly clear that the nominee lacks a demonstrated commitment to equal justice and an understanding of the role of courts in protecting rights and liberties.

He is a person of limited legal experience and his record in the public offices that provide the bulk of that experience has

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<sup>39</sup> See, e.g., Thomas, "The Higher Law Background and the Privileges and Immunities Clause of the Fourteenth Amendment," Harvard Journal of Law and Policy, p. 63, 64, 69.

been given low marks by those who are most familiar with it. Members of both Houses of Congress who monitor the agencies that the nominee has headed have had to act on a regular basis to repair his defaults in performance and the damage those defaults have done to the lives of citizens whose rights he was sworn to protect. Federal courts that have examined the performance of the nominee at the Office of Civil Rights and the EEOC have found his actions to be contrary to law. Leading members of Congress have questioned the nominee's candor and a federal judge found that the Commission under Thomas's direction "has been no more candid with this Court than with Senate committees and the public."<sup>40</sup>

In other words, those responsible officials who know the nominee's work best have found it grievously wanting. These assessments are the antithesis of the kinds of recommendations one would expect to accompany the nomination of a candidate with a distinguished record of public service.

The record is made worse by the nominee's confrontational style in his writings and speeches, and by his failure to demonstrate a real understanding of the role of major institutions in our society.

Given all this, why should the question of confirmation be a close one? If it is, it is only because questions of . . . continue to cloud the judgment of otherwise sensible American citizens. The hope of the nominee's supporters as one commentator has said is that "the Senate will judge him less harshly than a white candidate with equally poor qualifications."

Members of this Committee know as well as members of the Caucus that such a judgement would be a perversion of the ideal of affirmative action, that it would ill-serve the needs of the millions of citizens of all races that we have been elected to represent and that it would not promote the larger interest of the nation both in equal justice and domestic tranquillity.

The best way to serve these great purposes would be for the Committee to reject this nomination and to ask the President to send another name to the Senate.

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<sup>40</sup> AARP v. EEOC, supra note 5, at 238.

The CHAIRMAN. Now, because we went out of order to accommodate the schedules of our colleagues on the House side, we are now going to hear from two distinguished panels, both panels supporting, and strongly supporting, Judge Thomas' nomination to the bench.

The first panel is made up of three very distinguished persons: Alphonso Jackson, the director of the Dallas Housing Authority, an authority that is probably as big as some States in the Nation; the Reverend Buster Soires, pastor of the First Baptist Church—it just says First Baptist Church, New Jersey. What city?

Reverend SOIRES. Somerset, NJ.

The CHAIRMAN. Somerset, NJ; and Mr. Robert Woodsen, president of the National Center for Neighborhood Enterprise. It is good to see you. You have been here many days during the hearing, and it is good to have you here, Mr. Woodsen.

Welcome to all of you. I thank you for coming to testify. Unless the panel has concluded otherwise, why don't we begin in the order that I have—well, you begin any way you all this. I can see they are pointing to you, Mr. Woodsen. Why don't you begin?

**STATEMENTS OF A PANEL CONSISTING OF ROBERT WOODSEN, PRESIDENT, NATIONAL CENTER FOR NEIGHBORHOOD ENTERPRISE; ALPHONSO JACKSON, DIRECTOR, DALLAS HOUSING AUTHORITY; AND REV. BUSTER SOIRES, PASTOR, FIRST BAPTIST CHURCH, SOMERSET, NJ**

Mr. WOODSEN. Thank you, Senator. We are truly delighted to have this opportunity for you to hear from the other side of black America.

As you indicated, 60 percent of black Americans were undecided when Judge Thomas' nomination was first introduced. In recent polls, one conducted by Jet magazine, a black publication, indicated that over 60 percent of black Americans now support him after having heard him present himself.

As a veteran of the struggle for civil rights and having led demonstrations in the 1960's in suburban Philadelphia, I witnessed first hand the sacrifices that were made to end this country's apartheid system. Following the death of Dr. King, I intervened in the confrontation between rioters to restore order and organized a nonviolent means to enable those who had no voice to redress decisionmaking.

Early in that movement, it became quite apparent to me that many of those who struggled most and suffered in the struggle for civil rights did not benefit from the change once the doors of opportunity were open. This was a fact, and the leadership of the civil rights movement, a lot has been made of the position of the leadership. To what extent does it reflect popular black opinion?

Well, let me say to you, as a veteran of the civil rights movement, I can recall when the students at Orangeburg first sat down and engaged in civil disobedience. This strategy was not embraced by the leadership. In fact, they were opposed to it. It was only after it became popular did the leadership embrace it. And when Dr. King entered into Birmingham, he was not embraced by the leadership. Again, when Dr. King wrote his letter from a Birmingham

jail, when he challenged the sincerity of white moderates, the leadership at that time said that Dr. King was in danger of alienating the white support.

Again, when Dr. King—I remember, as an official with the NAACP at the time, being on the dais with Roy Wilkins—

The CHAIRMAN. You were an official?

Mr. WOODSEN. I was an official with the NAACP at the time at the local level. I led demonstrations. And I remember being on the dais when Roy Wilkins was the speaker. That was the day that Dr. King announced when he was going to join the peace movement with the civil rights movement. He was characterized by Carl Rowan as a Communist. It was the civil rights leadership that castigated Dr. King because, they said, he would weaken the civil rights movement.

But Dr. King, being the leader that he was, did not just simply reflect popular opinion or the consensus of the majority. He knew that he had the majority of blacks behind him, and that consensus drove this movement.

Again, the civil rights leadership opposed Jesse Jackson's candidacy for the Presidency in 1984. They said it was ill-advised for him to run. Eighty percent of blacks who voted supported Jesse Jackson. It was hailed by the civil rights organization at that time, the next year, as the greatest thing that ever happened to black America.

They were out of touch on those circumstances in the past, and they are out of touch today with Judge Thomas. Clearly 60 percent of black Americans having heard Judge Thomas now support him. And the reason is that there has been—there is no single black America. We talk about blacks and minorities and poor as if they are synonymous. Judge Thomas understood what some of us in the movement understood; that it is important to understand that not all black Americans suffered equally even under discrimination; that some of us were better prepared to deal with the storm of racism and discrimination.

As a consequence, you see a bifurcation of the black community today. Black families with incomes in excess of \$50,000-plus have increased 350 percent over the last 20 years while black families with incomes below \$10,000 have also increased. If racial discrimination were the sole culprit, then why are not all blacks suffering equally since only one out of six whites with a college degree works for government and three out of six blacks with a college degree work for government?

You have a proprietary interest in the maintenance of race-specific solutions, and I have prepared and submit for the record an article written in 1965, October 29, that says, "Civil Rights Gains Bypassing Poor Negroes," written by Bill Raspberry who quotes the civil rights leadership in 1965. In this article, the civil rights leadership said, "Continued emphasis on race-specific solution will never address the problems of poor blacks, that we must mount an economic development program to address their needs."

The civil rights leadership, because many of their members benefited, continues to ignore this reality and press race-specific solutions to the detriment of poor blacks. And as a consequence, some of us—and Clarence Thomas certainly is numbered in that group—

began to understand that, yes, we affirm the progress of the civil rights movement, but the strategy is insufficient, that we must now define affirmative action differently so that it exempts the sons and daughters of the panelists here and people in my—my son—I have four children. My oldest boys have a better education than most whites. They went to Wilmington Friends School, Senator. Therefore, what we believe is that if affirmative action, as Clarence Thomas has said, should be redefined to apply to low-income people, white, black, Hispanic, whatever, since we only have a limited amount of resources, that we should concentrate those resources among the people who are in crisis.

And so Clarence Thomas, I think, brings that very important perspective to this issue, and therefore should be confirmed on the Court when the issue of the future of black colleges, public-supported black colleges are being destroyed in the name of integration, and they educate most black youngsters, not Harvard, Yale, or Stanford. Therefore, there are many issues that go beyond affirmative action that we think Judge Thomas is eminently qualified to sit in judgment.

The CHAIRMAN. Thank you very much, Mr. Woodsen.  
Mr. Jackson.

#### STATEMENT OF ALPHONSO JACKSON

Mr. JACKSON. Thank you, Mr. Chairman.

I am Alphonso Jackson, the executive director of the housing authority for the city of Dallas, and a personal friend of Judge Clarence Thomas. I am here before you today to testify on his behalf.

I, too, like Judge Thomas, came from humble means, as the last of 12 children to Arthur and Henrietta Jackson. Although my mother was a high school graduate, my father was not, but he still managed to educate all 12 of his children. He taught us the value of giving back, not only to the society at large, but to the African-American community specifically.

In 1965, while a freshman in college, I left at the request of Rev. Bernard Lee, the top aide to the Rev. Dr. Martin Luther King, to go to Selma and be instrumental in the voter registration drive.

I also, as many others did, participated in the march from Selma to Montgomery. Furthermore, I spent the summer of 1976 working for the NAACP, at my own expense, at the request of Margaret Wilson, then chairperson, and the Rev. Ben Hooks, the executive director.

Upon graduation from law school at Washington University, in St. Louis, I then met Attorney General John Danforth, who introduced me to Judge Thomas. We have remained steadfast friends for the past 18 years, and I dare say that both of us were enriched by Senator Danforth's kindness and wisdom.

Judge Thomas is the every man we strive to be. He is intuitive, insightful and highly proficient in the law, with extremely valuable hands-on experience in public policy. He possesses keen intellect and strong values that would benefit the Supreme Court.

The Clarence Thomas I know is a self-made man, who has worked enormously hard to get where he is today. He will serve the Supreme Court well, not through quick and simplistic means,

but through his own strength of character, perseverance and strong belief in the American dream.

As a public official working with low-income families over the past 6 years, I have seen Federal programs go astray. Programs that initially had good intentions have turned out to have devastating effects on low-income families. The overly-subsidized existence has killed the spirit and, in many instances, left these families hopeless.

It is painful to see the hopelessness that exists in many low-income communities. But what is more disillusion is to see the acceptance of this hopelessness. I often reflect back on my idealistic days when I, too, felt the programs would change the world, but my liberal vision has faded. I firmly believe that self-help is the road to salvation for all low-income people, especially African-Americans.

Clarence Thomas' view of self-help is one that I fully support and a view that is supported by most and many African-Americans. His focus has always been on moving individuals towards self-sufficiency. He understands the need for economic empowerment of all minorities, and to expand the education and economic opportunities, while emphasizing the importance of self-direction.

Clarence Thomas' life story reveals a more complex human being than the conservative label might suggest. Clarence was taught to never ignore discrimination. In addition, he was taught the way to defeat it was through hard work and education. I can tell you, from my discussions with him, he remembers the pain and humiliation of discrimination, as I do, and he vowed never to forget those incidents that ultimately shaped his life and mine.

Judge Thomas' nomination should remind us all in this country that every person can rise as high as he or her ability will take them, regardless of color. He symbolizes our continued commitment toward making the American dream a reality for every American.

Despite the serious and sincere disagreement between Judge Thomas and others in the civil rights movement to reach this goal, I firmly believe that Judge Thomas will be capable of recognizing racism when it comes before him on the Supreme Court, competent to judge critical issues and compassionate to rule on each of them according to the facts, and not politics.

The question should not be whether Judge Thomas is a liberal or a conservative, but, rather, does he have the ability to interpret the law fairly and judge with compassion. There is no doubt in my mind that he will be fair and equitable Justice of the Supreme Court. My question to you, Senators: Isn't that simply what we want? We want a Justice that will be fair and equitable.

I am elated that President Bush made a bold and decisive act of nominating Clarence Thomas for the next Supreme Court Justice. I am proud of the confidence that the President has placed in a man he trusts will act in a just and fair manner, regardless of political pressures.

I have traveled Africa, Asia and Europe, and each time that I land back on our shores, I simply say God Bless America. Even though we are still faced with an enormous amount of racism, this country is mine, and I too agree with Judge Clarence Thomas,

when he stated during President Bush's announcement of his nomination, that this could have only happened in America. Only in America, gentlemen, can a citizen be recognized for his or her achievement, regardless of their background, race or religion. Only in America, gentlemen, can a role model like Clarence Thomas show our children that, if they work hard enough, there is a better tomorrow and there is a pot of gold at the rainbow.

Finally, only in America, gentlemen, can an African-American such as myself have the honor of sitting before you today testifying on behalf of not only my good friend, but an individual whose credentials are above reproach and whose experience uniquely qualifies him to serve on the Supreme Court.

Lastly, I think it is important to say, when we get to the question, that I am truly, without a doubt, within the 1960 group that benefited from affirmative action programs, and I accept that fully. But I will say to you today that I practice affirmative action for my children by paying for their education.

I have a daughter that is an honor student at the University of Texas, who got there on her merits, who graduated third in her class, from one of the best prep girls schools in this country, and that is affirmative action, to me. I have a daughter who is in the top of her class at one of the leading prep schools in the country, and that is affirmative action.

I truly believe that we must practice affirmative action, but it must be for those who are most in need, not my children. Therefore, I say to you that I fully ascribe to Clarence Thomas' belief that affirmative action is important, but those of us who have made it must stop relying on excuses and begin to produce.

I close lastly by saying simply this: I am happy to be here. Last year, African-Americans in this country consumed \$380 billion. Anglo-Americans did not tell us how to spend one penny of that. I am saying to you today, some responsibilities we must take for ourselves.

Thank you.

The CHAIRMAN. Thank you.

There are about 7 minutes left to vote. Rather than interrupt your testimony in the middle, because I am going to have to go vote, Reverend, I think maybe it would be wise for us to recess and come back.

Let me ask you, because we may start before I get back, because whoever comes back first will start, let me ask you a question, Mr. Jackson. I am a little confused by your testimony. You talk about the fact that there is this cycle of despair and expectation of the Government to help, that is, in the African-American community, that has been spawned by affirmative action programs and those kinds of programs. Then you say those of you who made it should stop relying on affirmative action. I don't imagine that is where the despair is, is it, among those of you who have made it?

Mr. JACKSON. Sure, I think the despair is between those of us who have made it, who consistently create excuses for others not making it. My position is simply this, that I practice affirmative action by making sure that my two daughters are educated well. There are others that are not in the position that either one of us at this table are in. Those persons clearly must receive affirmative

action, whether they be Anglo, Hispanic, African-Americans. There are a lot of poor people in the world, and when we discuss the largest—

The CHAIRMAN. Well, if they have affirmative action based on that basis—you said you are a beneficiary of affirmative action. I don't know in what circumstance, whether it was law school or college.

Mr. JACKSON. Law school, specifically.

The CHAIRMAN. Law school. You wouldn't have gotten into law school, even on affirmative action back in those days, if it had been a pool, not of merely black Americans and Hispanic Americans, but if it had been a pool of all Americans in need, because I expect my financial circumstance wasn't any better than your financial circumstance—I don't know that to be true. My father made \$12,000 a year, so I don't know what that was, with four children.

Mr. JACKSON. That is about what mine made.

The CHAIRMAN. So, I imagine we would have been competing with one another for affirmative action, along for every one of you, there were 15 of me or 10 of me, because there are ten times as many white folks as there are black folks, 10 times as many poor white folks as there are poor black folks. So, how would you have gotten into school?

Mr. JACKSON. I think at the time that affirmative action was being practiced, it is clear that there were very few African-Americans in this country that could afford the kind of education that exists today. That is not the case. I think that Mr. Woodson made it clear that our income has gone up over 300 percent.

The CHAIRMAN. I am not talking about that. I am talking about the black folks and minorities who can't afford it.

Mr. JACKSON. And I am saying that those are the people that we are speaking in reference to which should be given the opportunities, without a doubt.

The CHAIRMAN. But it should be in a pool—

Mr. JACKSON. That has not been the case, though.

The CHAIRMAN. But it should be in a pool of all Americans, not just black Americans.

Mr. JACKSON. All low-income Americans.

The CHAIRMAN. All low-income Americans. Well, you all know, in low-income Americans, you are outnumbered in a big way, don't you?

Mr. JACKSON. No, Senator, the very fact—

The CHAIRMAN. You are.

Mr. JACKSON. We are disproportionately represented there. Therefore, we will be disproportionately beneficiaries of whatever is done to that group of people.

The CHAIRMAN. As you know, that is not true, if you are talking about absolute numbers. If there are 100 spots open and, for the sake of argument, let's assume 80 percent of class A is disadvantaged and only 10 percent of class B is disadvantaged. If class B is 20 times as big as class A, you are still going to find yourself out of those 10 slots, most of them going to the folks in class B. That is the only point I am making.

I just think we should kind of get our facts straight. You all are the businessmen and I am just the politician. Let me stop here and you all think about that for a minute until I come back.

Senator Simon is here, let's continue. Reverend, why don't we begin with your testimony, and then I will come back and we will continue questioning for the whole panel.

Thank you.

#### STATEMENT OF REV. BUSTER SOIRES

Reverend SOIRES. Thank you very much for having us.

I am the Pastor of First Baptist Church in Somerset, NJ. We have a membership of approximately 3,000 congregants, and I have been there for 10 months. Prior to accepting this call to this church, I spent 5½ years traveling throughout this Nation, speaking primarily to high school students, warning them about the dangers of drugs and immoral behavior and activities which would preclude successful futures.

Prior to that, I served as the national director of Operation PUSH. I reported directly to Reverend Jesse Jackson, who gave me unusual exposure and invaluable training in my efforts to become an advocate for people. In 1988, I ran as a delegate to represent Reverend Jackson at the Democratic National Convention.

I have come here, in light of my experience and exposure, to support the nomination of Clarence Thomas to the Supreme Court. I believe that Judge Thomas has a knowledge of the Constitution, which qualifies him for membership on the Supreme Court. I believe that his personal integrity and demeanor bring to bear wonderful implications for mediation between the two branches of Government, the executive branch and the legislative branch.

Moreover, I believe that, as a pastor, that Judge Thomas reflects more character and personal integrity that display values rooted deep in the American tradition and in the black tradition. I have watched with great interest and listened with great intrigue to the discussion around Judge Thomas, and I would like to focus on the enigma factor.

I think, Senator, one of the important discussions that we should have is why this enigma factor, which I think you yourself have pointed to, seems to be so prominent.

I think, first, we should see the enigma that surrounds Judge Thomas within the context of the overall enigma in which we all live, the enigma of having voting rights, yet the majority of the Americans do not vote, the enigma of having civil rights, yet we have a disproportionate number of people who did not have civil rights still living in poverty.

Even beyond that, the legal enigma today—I listened with great interest to the prior panel, the Congressman from Houston, I am certain, will attest to the fact that in his city today, the No. 1 issue among the mayoral candidates is the issue of crime, and 25 percent of the cases that go before the Supreme Court have less to do with abortion or affirmative action than they do crime.

Crime has become such an enigma, that black people and black neighborhoods are afraid of black children. The root cause goes back for centuries, but the reality is this, that that is an enigma. It

is an enigma today that, in New York City, the greatest concern among the people that I speak to is the fact that the Board of Education has decided to distribute condoms to teenage children, without their parents permission. That is an enigma. It is an enigma, because, on the one hand, we have the question of individual rights, and, on the other hand, we have the issue of the integrity of the family. It is an enigma which may end up in the Supreme Court.

In the city of Detroit, I went to speak at a public high school, where we had another enigma. The enigma was that parents were pressing the school to install metal detectors, because children were bringing weapons to school. Civil libertarians and some advocates of civil rights opposed the parents, who were attempting to protect their children, in the name of individual rights.

The point is we have such a complex situation today that is much larger than the black/white situation or the civil rights situation, that Clarence Thomas' appearing to be an enigma may not be as enigmatic as we think he is, if we look at the overall enigma of our social condition.

If one is pro-life today, that person, if he is in public life, is characterized as being anti-woman. If he is pro-choice, then he is accused of killing babies. If a person changes his views, we say he can't be trusted. If a person is rigid, we say he is narrow-minded. If a person works inside the system, we say he has turned his back on his people. If a person attacks the system, we say he has got a chip on his shoulder. If a person advocates government help, then we suggest he has a welfare mentality. If a person proposes self-help, then we say he blames the victim. If a person is a flaming liberal, then we say he's not practical. If a person is a conservative, we call him an opportunist.

The problem, Senator, is that the labels that have traditionally described people are no longer applicable, given the enigmatic climate in which we live.

So I support Judge Thomas, not because I agree with everything he has said—I don't agree with everything I have said. [Laughter.]

I support Judge Thomas because I believe he possesses the personal qualities that include recognizing the flaws in our society. When I look at Judge Thomas, I see a man who sees a need to reflect on his own thoughts. I would not want a Senator, a Supreme Court Justice or a President who cannot admit that there is a need to reflect on things he has said and things he has done.

I support him because I believe he respects the integrity of the judiciary, and he is willing to rise above personal preconceptions and pledge impartiality on difficult cases.

I am not frustrated by the fact that Judge Thomas insists on being loyal to the judicial code that requires impartiality and giving each case due consideration on its own merits.

I see a man who personifies the tension of moving up and reaching back. Each of us who lived in middle class or upper class neighborhoods has this tension of how do we in fact reach back and support people who have not been as successful as we. And while we may differ in style, all of us should be consistent in substance.

I think what inspires us today as a free society, and as we consider even intervention in foreign lands, what inspires all of us is the

character and will of our forebears, whether our forebears be men who rode on horseback crying, "One if by land or two if by sea", or whether our forebears be slaves who sang songs like "Ain't gonna let nobody turn me around." What inspires us is their character and their will, and I believe that Judge Clarence Thomas is another link in this great train of freedom which represents the greatest social achievement in human history. Never before in the history of this planet has there been a social experiment like the one that you preside over. There has never been at any point in history a precedent set for how to take people who were characterized as "60 percent human" and matriculate them as full citizens into a society.

So yes, we need diverse opinions. We need to be able to admit when we have made mistakes. We have no society to which we can look at a model. We've got to work through this proposition all by ourselves.

So I support Judge Thomas because I believe that he is willing, as a post-World War II citizen to say that perhaps we need a new interpretation of what we mean when we say we are committed to justice and fairness and equality, and I think that new interpretation will be a ray of light and a ray of hope for our entire Nation.

Senator SIMON [presiding]. Thank you, Reverend Soires.

The puzzle, the dilemma that we face is in a sense illustrated by your presence. You mentioned the Reverend Jesse Jackson, who takes precisely the opposite position that you do on Judge Thomas. Congressman Payne from your State also is on the other side.

I agree with you that a judge should be impartial. But a judge does not come to the court with a blank slate. And here is the problem that I see that we face on this committee, and I would be interested in the comments of any one of the three of you.

If we were to judge Clarence Thomas by his record at the EEOC, at the Department of Education, by his written statements, if I were to judge by that alone, frankly, it would be a very easy negative vote for me because it is not a record that provides help on employment and the kinds of things that are very important to less fortunate Americans.

On the other hand, if I look at the student at Holy Cross, if I look at the record of growing up, and if you look at his testimony, it differs appreciably from his written record and his statements.

So I have two Clarence Thomases, and the question is which Clarence Thomas is the real Clarence Thomas. And it is very different from, if I may use the illustration, Thurgood Marshall. You could look at his record and what he had said, and you knew where Thurgood Marshall was going to go on the court. I don't see that same consistent pattern with Clarence Thomas.

Any comments from any one of you?

Reverend SOIRES. Yes, I'd like to respond, Senator. First, on the issue of the distribution of condoms in New York, for instance, if I were a Senator, I would on the one hand have wanted Judge Clarence Thomas to assure me that he would take a position that parents have a right to say something about their children receiving condoms. On the other hand, I appreciate and respect the fact that he is willing, by his own testimony under oath, to assure me that

he is willing to look at each case individually and to make a decision on that case based on the merits of that case.

When I looked at this record of Judge Thomas, quite frankly, I had the same questions as you; but then I began to interpolate the executive branch experience into a prospective Supreme Court position. And by that, I mean this. Judge Thomas was loyal to the execution of his executive responsibilities as he understood them. Therefore, I expect that same kind of loyalty to be consistently applied in the judiciary and that Judge Thomas will be as consistently loyal to the principles of the judiciary as he was consistently loyal to the responsibilities in the executive. And so I am quite comfortable.

Senator SIMON. I guess it is one thing to be loyal. I expect you to be loyal to your employer.

Reverend SOIRES. To principles, I said.

Senator SIMON. But I don't expect people to say things they don't believe in.

Reverend SOIRES. No; I said loyal to principles. I believe that Judge Thomas articulated and executed within the scope of what was possible—he wasn't the president; he was the chairman of an agency—to the extent that he felt he was properly interpreting statutes and laws.

I heard him described as being "lawless," and there is a difference between being called in by oversight committees, as I understand the process, and being charged with criminal offenses. If Judge Thomas were as "lawless" as he has been described, why has he not been charged with breaking the law?

So I don't think that Judge Thomas was unduly loyal to his job. I think Judge Thomas was appropriately loyal to the role that he played, and he was consistent in attempting to apply statutes as he understood them to be fair and to be honest.

No one in America, including those who disagree with us on the Thomas issue, would suggest that affirmative action, for instance, means that one group deserves to treat another group unfairly. No one argues that. But we have seen this concept of affirmative action—which, by the way, is not really an antidote to racism. To suggest that affirmative action is the antidote to racism I think is ludicrous and is not based in anything that is real. And also, by the way, to suggest that affirmative action and quotas are not the same I think is one of the difficulties we have with affirmative action because we heard in these chambers today the suggestion that if Judge Thomas is on the Supreme Court, then there will be no more black appointees for our lifetime, which suggests that there is a quota of one on the Supreme Court, and I have never seen that written anywhere.

So what I am suggesting, Senator, is that Thomas has had an opportunity to reflect on his role in the executive branch, and I think in all due fairness, out of great respect for the process, has pledged impartiality and has pledged loyalty to the ethics and the principles of the judiciary if confirmed as a Supreme Court Justice.

Senator SIMON. Mr. Jackson, Mr. Woodsen, and then I will yield to Senator Grassley.

Mr. JACKSON. I think my answer, probably having known Clarence longer than anyone sitting at the table, since we started out

together in St. Louis with one of the persons who testified this morning, Larry Thompson—we are all very close friends—I think how I would answer that is evolution. And let me give you an example, if I might, of evolution. And I'd like to use you, Senator Simon.

I have long followed you from the time of your newspaper days in Illinois to Representative Simon to Senator Simon. I lived in St. Louis for 17 years of my life. It is clear to me that during the Presidential campaign of 1988, some of the views you had espoused early in your career were quite different at the end during the campaign. I don't think in any way you were untrue. I think what had occurred is that you had evolved; you had become wiser, you had looked at the issues more in-depth, you had decided that the approach that you had taken very early in your life was not the approach that you would take—not that it was incorrect, but you have taken another approach.

I think what we see in Judge Thomas is evolution. I don't see enigma. I don't see two Judge Thomases. I have had tremendous debates with him, tremendous disagreements, but in the final analysis, the Judge Thomas that I know is a person of integrity, competence and compassion who deeply feels for what is happening to African-Americans in this country, who will be an excellent jurist. And I think what you have seen with Judge Thomas in these hearings and through his life is evolution. And I think you and I both know that we will continue to evolve until the Almighty decides that we are no more.

So I am saying in making that analogy, just as I have seen you evolve, just as I have seen you take different stands on issues from the time I can remember you being in St. Louis, and then so you'll know who met you six or seven times with one of your personal friends, Jack Kirkland, at his home; I have seen the evolution.

So I am saying give Clarence Thomas the same due deference that others have given you and others have given others. I think what we see is an evolution, and I think he will be an excellent jurist.

Senator SIMON. Mr. Woodsen.

Mr. WOODSEN. Just a footnote to that. I think he has been certainly in this regard falsely accused of being in opposition to affirmative action. It was Ben Hooks, president of the NAACP, who said on issues of individual discrimination, Judge Clarence Thomas will nail a person or an institution to the wall on cases of individual discrimination. He differs on the application of it when it comes to group remedies. So that point.

The other thing, as a footnote to Mr. Jackson's point, yes, people are evolving. If you maintain the same views over time, you are called rigid or an ideologue. And I think that Judge Thomas' views are evolving.

I remember the Congressional Black Caucus when they were freshmen Congressmen, they were unalterably opposed to the seniority system until they were in positions of seniority. Now they are steadfast supporters of it. Were they hypocrites then, or did their strategic circumstance change and therefore their views on things change?

I think it is in this regard that we ought to view Judge Thomas. I find his record, I find his positions on principle totally consistent, and I think that for that reason that some of the charges against him are just not true.

Mr. JACKSON. And may I make one comment? I think, too, what you have seen, which deeply bothers me, is that we have right now in America a tremendous debate about how we should get where we should be. Should we continue to rely on Government as the only source for us to make it, or can we somehow begin to take some of the responsibility and say we can do some of the things on our own?

Senator SIMON, it is important to me to understand that pre-1960, we had more banks that were owned by African-Americans in this country than we did after the Sixties. We owned our own hotels. We owned our own restaurants. We owned our own hotels. I think that the Great Society when it started, started out well, but I think it took our independence away and created dependency, and I see it every day, as I said in my speech, hopelessness.

So when you get a voice who says, look, some things we must take responsibility for ourselves, even though we understand that racism still runs rampant in this country, there is no question. But some things, as I said to your earlier about your evolution, the evolution of African-Americans in this country to what we perceive as the conservative lean, scares many of the liberals who have bought into the doctrine that Government owes us something and should repay us.

Well, let me say this to you. I might be labelled after this as a conservative, but I think my mother and father were conservatives because they taught us to go to church, they taught us the value of family. My father never made more than \$12,000 and educated all 12 of us, and he brought us up with the fear of God. If that's conservatism, I am happy, because that is the way that I want to bring my kids up and I'm trying to bring them up.

So that what you have is a dichotomy. We have been told by people in this country that you owe something—it's clear racism was devastating on us, and it is still devastating. But let me say this to you, as my father said, who did not have a high school education, the way that you fight racism is to educate yourself. We did. Affirmative action was very helpful to me. My way of dealing with affirmative action is that I educate my kids very well. Therefore, when my daughter left her high school she was third in her class, and she is doing work on her own. I think that is important. And I think when that is said, that scares a lot of people, when we start saying we're not going to hold every Anglo person in American responsible for what has happened.

Senator SIMON. Thank you very much.

Senator THURMOND.

Senator THURMOND. Thank you very much.

Mr. Jackson and Reverend Soires and Mr. Woodsen, we want to welcome you here. I admire you for coming here and taking the stand that you are. You are taking just the opposite view from what the Black Caucus did. That took courage. It took endurance. It took character, integrity.

I appreciate your coming here and expressing your views in spite of some of the positions some of the black leaders have taken.

I just have two questions, the same questions I have asked these others who have come and testified here on behalf of Judge Thomas. You can answer it first and then right down the line.

Is it your opinion that Judge Thomas is highly qualified and possesses the necessary integrity, professional competence, and judicial temperament to be an Associate Justice of the United States Supreme Court?

Mr. JACKSON. Unequivocally, yes.

Senator THURMOND. I didn't hear you.

Mr. JACKSON. Yes.

Senator THURMOND. The answer is yes. Reverend Soires.

Reverend SOIRES. Based upon everything I have read and heard and seen from him, the answer is yes.

Senator THURMOND. The answer is yes.

Mr. WOODSEN. Yes.

Senator THURMOND. Mr. Woodsen's answer is yes.

The second question: Do you know of any reason why he should not be made a member of the Supreme Court of the United States?

Mr. JACKSON. I will answer it this way: The Sunday or the Monday before President Bush nominated Judge Thomas for the Supreme Court, that Friday we had breakfast, and I said to him that, in my mind, the best thing that could happen is that the President nominate you to the Supreme Court because I think you will bring to the Supreme Court some values, some ideas, and a perspective that is not there that is badly needed. So my answer to you is absolutely I think that Clarence will be a tremendous addition to the Supreme Court.

Senator THURMOND. Do you know of any reason why he should not be made a member then?

Mr. JACKSON. Absolutely not.

Senator THURMOND. The answer is no.

Reverend Soires.

Reverend SOIRES. No, Senator.

Senator THURMOND. The answer is no.

Mr. Woodsen?

Mr. WOODSEN. No.

Senator THURMOND. That is all the questions I have. Thank you very much for your appearance. I think you made a fine impression.

Senator SIMON. Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

I want to welcome each of you to the committee. Frankly, we are very proud to have you here before the committee.

When Judge Thomas was testifying, I asked him about affirmative action. And as I interpreted his answers, he is for every aspect of affirmative action except for preferences. Do you know of any difference from that statement?

Mr. JACKSON. No.

Mr. WOODSEN. No, I don't, sir. I think he said it should apply to people because of economic circumstances, and he would have qualified under those guidelines.

Senator HATCH. Well, I remember when he was being criticized by some. They indicated he was against affirmative action.

Mr. WOODSEN. That is not true.

Senator HATCH. It is just not true.

Reverend SOIRES. Senator, before you came in, we talked about the enigma of our current social situation. One of the enigmas is that today complex issues have been reduced to sound bites and slogans. When I was coming up, equal educational opportunity was an issue. It was reduced to the word busing. And we became characterized as either being for equal educational opportunity or against equal educational opportunity based on our response to the issue of busing.

The same thing has happened with the terminology affirmative action. Affirmative action for me and for those persons with whom I grew up meant this: that there was an inside crowd and an outside crowd. The inside crowd had been protected by laws and by traditions which virtually excluded the outside crowd irrespective of qualifications. Affirmative action meant that the inside crowd would use creative ideas and meaningful efforts to include the outside crowd based on the fact they had been excluded without regard to qualifications.

And so affirmative action meant that the Government would protect the outsiders from being excluded simply by virtue of the color of their skin. Government intervention has never been the question that we debate. When land-grant colleges were created, that was a wonderful initiative. When the Veterans' Administration gave veterans vouchers to buy homes and go to schools anywhere in the country, everybody applauded that. We are not against Government intervention or affirmative action. We are against using affirmative action as a means of denying other people opportunities in the name of helping the outsiders so that the outsiders are now discriminating against the insiders and then become victims themselves.

Last Sunday in the New York Times, the New York Times described the affirmative action generation, my crowd, people who have benefited substantially from affirmative action. And there was one aspect of that article that troubled me, and that was that the white peers of blacks in many major corporations perceived their black peers as having been inferior simply by virtue of the assumption that they were there due to affirmative action. We have got to figure out a more creative way and a fair system to ameliorate the injustices without creating more injustices.

Senator HATCH. Mr. Woodsen.

Mr. WOODSEN. Senator, let me just give you two examples. I think what we are engaged in here—and I mentioned earlier in my testimony that there is a bifurcation in the black community. In the last 20 years, black families with incomes of \$50,000 have soared 350 percent to the point where they are at 93 percent of parity with whites, while those families representing one-third, their incomes are getting worse. So obviously race alone is not the sole culprit. There are other factors at work here.

But what we do is engage in a kind of bait and switch game where the conditions of all blacks are used to justify affirmative

action remedies that only help blacks who are highly unionized or those who are highly professional. And we see examples——

Senator HATCH. Or those who can make it on their own, is what you are simply saying.

Mr. WOODSEN. Those that can make it. And so we think it ought to be defined in terms of economic conditions.

But two quick examples. Last year, a former black mayor of a Southern city, who was an architect, well educated, purchased a license for a television station that was set aside to get blacks into the television ownership industry. He purchased this for a nominal amount of money and turned around in two weeks and sold it to a white company for millions of dollars, realizing a windfall and, when challenged on this, said, "I did nothing illegal."

Now, blacks are still not in television in that city, but here was a windfall going to a single individual who, because he was identified as black, was identified as being disadvantaged. And so the public feels and believes that now we have served the interest of blacks. We are saying that this is immoral, it is wrong, and that these specific remedies need to be challenged to determine under what circumstance are certain kinds of affirmative action good or bad public policy.

Mr. JACKSON. I think also, if I might answer, we must make a distinction between affirmative action and race-based remedies. There is clearly a distinction. And I think we must make a distinction between affirmative action as it has been applied as of today with how I perceive it should be applied.

I too, like Judge Thomas, do not believe that race-based remedies are the best that we can do, because when you do that, clearly you alienate others. And that is not to say that as an African-American we have not been discriminated against—truly we have, and I want to make that clear—in this country and continue today. But I do think that there is a large enough class of us, and clearly we can make a distinction.

Second, I have to give you a story. I was talking to my daughter, and both of my daughters and I are extremely close. She said to me the other day, she said,

Dad, I was in the dormitory. We were talking. And we had some kids who were beating the system. Their fathers were doctors, lawyers, principals. But through a system of saying that I am independent and I don't have an income, they could clearly fall under the area where they could receive aid.

In my mind, that is absolutely wrong when you have so many African-Americans whose fathers or mothers are not doctors, lawyers, et cetera.

I said to her, "Don't declare independence," and I am not wealthy, as I sit before you all today. But I feel that economically I am in the position to pay for her education or their education and I should. And I think clearly when we start talking about affirmative action, we are talking about affirmative action to benefit those who are most in need.

And let me assure you, I run one of the largest public housing agencies in this country, and I see kids every day that are bright and intelligent. But because of a lack of money, they can't go to college. And I have spent an inordinate amount of time getting

them money to go to college. They are the people in my mind who should be the recipients of affirmative action.

Senator HATCH. You seem to be saying, Mr. Woodsen, and all of you, that the system ought to be based upon disadvantage regardless of race.

Mr. WOODSEN. Absolutely.

Senator HATCH. Or any other factor. But if you do that, then it seems to me that there might not be as much help go to black people or black kids as goes today. Do you agree with that?

Mr. WOODSEN. No, I don't. I think if you did it based upon proportionality of those in poverty, you will find that since we are 30 percent of those in poverty, that 30 percent of the money should go to—

Senator HATCH. So you wouldn't do it on the basis of proportionality but across the board regardless of race.

Reverend SOIRES. Senator, two other points. One, if we are talking within the context of having to choose between groups, then we will always have a problem. When we have a domestic policy that addresses the needs of all America, then we don't have to worry about which groups gets in and which group gets left out.

Senator HATCH. So we will have less discrimination because the system—

Reverend SOIRES. That is right. That is No. 1.

Second, I don't think we should focus on affirmative action as if the resolution of that debate concludes the problem. In Trenton, NJ, where I live, the dropout rate at the public high school is 53 percent. It would not matter what kind of affirmative action program the bank downtown had; 53 percent of our children won't be qualified to work there if there was a set-aside program to guarantee them all the jobs.

The deeper problem is to get at those systemic issues that sustain poverty and hopelessness and illiteracy, because affirmative action becomes almost moot in the face of a generation that can dance but can't read. And that is not a black problem.

Senator HATCH. I have appreciated the testimony. I have just one last thought. All three of you know Judge Thomas?

Mr. JACKSON. Yes.

Reverend SOIRES. I don't know him personally.

Senator HATCH. You don't know him personally.

Mr. JACKSON. I have known him for 18 years.

Senator HATCH. But all three of you are for him for this position?

Mr. JACKSON. Absolutely.

Reverend SOIRES. Yes.

Mr. WOODSEN. Yes.

Senator HATCH. Well, I am, too. I think it is a great opportunity to have a person go on the Court as young as he is, with his background, and with perhaps new ideas that may be very beneficial to everybody. So I want to thank you for your testimony. It has been very persuasive and I think very good. So we appreciate having you all here today.

Mr. JACKSON. Thank you.

Mr. WOODSEN. Thank you.

Reverend SOIRES. Thank you.

Senator SIMON. Senator Grassley.

Senator GRASSLEY. Do any of you have any questions or doubts in your mind about Clarence Thomas' commitment to civil rights and equal opportunity?

Mr. JACKSON. Absolutely not.

Mr. WOODSEN. Absolutely not.

Reverend SOIRES. I don't, and I feel comfortable saying that because, while we may differ within the African-American community and within the religious community and the overall community about priorities and approaches, I think we all agree on goals. It does concern me that many of us are willing to place things as priorities that I don't think should be priorities. As I mentioned to Senator Hatch, if we have a 53-percent dropout rate out of the public high school in our community, I think our priority should be that issue and not whether or not the bank downtown hires our kids. I think we have to deal with the bank downtown, but we have got to start with first things first.

So I think what you will discover is that when you talk to all of us long enough, we will agree on the problems and we will agree on the goals. The question is: What are our priorities and approaches? Therefore, Judge Thomas is as committed as Jesse Jackson, as Bob Woodsen, as anyone else who is doing anything else relative to civil rights. But the priorities and the approaches may differ.

Mr. WOODSEN. I think what Judge Thomas is doing, Senator, in my relationship with him, is to probe different questions. We need different questions asked. One of the questions that he asks, and I do too, is: If race alone were the principal culprit, how is it that blacks control 8 of the 12 major cities, the school systems, the health systems, the housing systems, and yet poor blacks are no better off now than when they were controlled by whites, according to the numbers. The downtown is booming, even in the Reagan era. Eighty percent of the development dollars going to those cities went to reconstruct the downtown, not in the neighborhood. Those were local decisions.

And what Clarence Thomas and others of us are asking is how are those local decisions made to build a Hyatt Regency downtown instead of a business incubative facility with retail shops in low-income neighborhoods that could serve as an anchor for the restoration of those neighborhoods.

I think that these are the kinds of critical questions that the Thomas nomination is causing to be debated within the black community, and I think this is a healthy occurrence.

Mr. JACKSON. May I add something? And I will probably try to be a little more simplistic about it. In a speech that I was giving in Colorado about 2 months ago, I simply said, as Reverend Soires said—and which I think is so important—and this was an issue dealing with where are we going in the year 2000 and how effective affirmative action has been in the African-American community.

The question that I posed at that time—or the person posed, I should say, that I had to answer, they simply asked: Are African-Americans better off today than they were 20 years ago? And I will not call the person's name because they are a noted civil rights person, automatically said no. My answer at that point in time was to the moderator: Which group of African-Americans are you

speaking in reference to? If you are speaking in reference to me, yes; or the three members of this panel, yes; or the leadership of the NAACP, yes; or the leadership of the Urban League, yes. We are better off. If you are speaking about the public housing residents in Dallas, Texas, no. They are not better off.

So when you pose the question, you have to ask: Who is better off? There are a group of us that are, and we have benefited greatly from affirmative action. And we took advantage of it. But the question today, which I finally answered to the person, was simply this: Let us not use affirmative action as a facade, because that is what we are using it as in these hearings as I hear many of my African-American brothers and sisters, many of my Anglo brothers and sisters speak.

What we should be asking ourselves more crucially than anything else is: What do we do about the educational deficit that exists in our inner-city communities? If tomorrow we decided that affirmative action would be only for African-Americans and that we would push it as hard as we could, it would do no good at this point in time when my young brothers and sisters are leaving high school reading at a fifth-grade level, doing math at a third-grade level. It would not help us.

So I say to you today, when you listen to testimony that has come before you and will precede us, the question should be asked: Which group of African-Americans have benefited? And those who have not benefited will not be at this table. Those of us who have will be at this table.

Senator GRASSLEY. There have been several other panels in previous days of African-Americans who have spoken, like you have, of their strong feeling of Judge Thomas' commitment to civil rights and equal opportunities. I would like to have you help me understand and all of America understand. With Clarence Thomas' commitment to civil rights, documented by so many different groups here, why do you think the so-called leadership of black organizations like the NAACP and the Black Caucus are opposed to Judge Thomas?

Reverend SOIRES. Senator, I became the pastor of a very traditional African-American Baptist Church 10 months ago. I have had a wonderful experience there for the last 10 months, and one of the new ideas that I introduced was computerizing the church's operation.

Some of the opposition that came to that was simply that we have never done it that way before. And I have this need to balance the tradition which has brought the church this far, and now innovative ideas to take the church to the next generation.

We have had 300 to 400 years of a very consistent kind of resistance movement against the racism of America. It takes a while to develop a new strategy with a broad consensus that moves from civil rights to economic empowerment. There are many organizations who have dedicated their lives and people who have dedicated their lives to the protection of the rights that were won after years of battle. And that is a legitimate pursuit.

But that pursuit should not function in exclusivity. We also need efforts as momentous as the civil rights movement to convince children not to have children. We need efforts to convince families of

the root responsibilities of families. We need efforts to convince people that laws don't change people. People change laws. Laws can change people's behavior, but it takes a new value system to change people's hearts.

The point is we are in disagreement not necessarily with the facts but with the priorities. We feel that in 1991 the priorities should be economic and educational empowerment, not race-based solutions simply, but, rather, economic conditions, economic programs, and economic solutions.

Senator GRASSLEY. And their opposition is because Clarence Thomas challenges that traditional approach?

Reverend SOIRES. Clarence Thomas comes along as a post-World War II baby. Clarence Thomas is not really a veteran of the pre-World War II leadership. He is 43 years old. I am 40 years old. I was too young to march with Dr. King. I was too young to go to jail 40 times and have my head beaten, and often perceived as someone who perhaps is not loyal to that tradition. But there does come a time—just like we did in the Persian Gulf—there comes a time when after the war is over you look at what is the next step. That doesn't mean that the war against racism is over, but we have our civil rights, we have our public accommodation rights, we have our voter registration rights. There is no need for me to lead a march on city hall to get the right to vote. My task in my community is to convince people to register and to vote.

Now, we have to protect the voting rights on the one hand, but that should not function in the absence of people who do what I do, and that is motivate people to exercise their rights. We are in partnership, not in competition.

Mr. WOODSEN. I think that part of it is ideological, too. Clarence Thomas does not fall conveniently into liberal Democratic tradition that many members of the Black Caucus have defined black Americans. They have become in one sense the police of black thinking. And there has been a gag rule imposed on the black community over the past 20 years that unless you see life through the prism of a liberal Democrat, you will be suspicious, you will be castigated. And so I think Clarence Thomas, because he does not espouse that position, is castigated.

I think members of the caucus talk about they are suddenly going to judge him based upon the content of his record and not the color of his skin. And yet there have been several black officials, including some of their own members, that have been guilty of personal indiscretions and illegal acts, and one judge in New Orleans who was guilty of accepting a bribe while on the bench and found guilty by a court. And I remember being on *McLaughlin and Company* with a member of the Caucus when John McLaughlin asked both of us: What do you think about what this man did? Do you think, as some are saying, that he was targeted by whites? And this member said yes. Not judging him on the content of his record or his character but the color of his skin.

And all of a sudden, when Judge Thomas emerges on the scene, members of the Black Caucus suddenly became color blind and wanted to judge Clarence Thomas based upon the context of his record. I think that this moral inconsistency is not really being perceived well in black America, at least the people that I talk to.

Therefore, I think his membership in a different club, if you may, is a source of much of the consternation and resistance to Judge Thomas.

Mr. JACKSON. I guess to add to what Bob has said, what Reverend Soires has said, I will not cast any aspersions on the NAACP because I am a member and I have a great deal of respect for Reverend Hooks and his wife and consider them my friends. I have a number of friends that I consider my friends on the Black Caucus.

What I will say to you, Senator, in asking the question, is that we have been a proponent over the years to the victim theory. And somehow anyone who wishes to escape the victim theory based on doing some things for themselves is labeled either a Tom, an Oreo, someone that is bought off by the system.

But one thing that we must keep in mind and I remind us all the time: Those who are calling us those names are clearly benefiting from the system. They serve on the major boards of the corporations in this country. They fly around in Lear jets. They play at the best country clubs. But yet they are telling us to accept the victim.

I see myself as an African-American extremely fortunate, having served both public and private life, having made a great deal of money. In the process of doing that, you must give something back. And I think Clarence Thomas simply says: How can we best give something back?

The way we give something back in my mind is to give people hope and to work with those who are most in need. And that is our philosophical viewpoint, rather than, quote, unquote, telling them that they are a victim, that the system will ever keep them a victim, they can never hope to escape being a victim, so therefore the best avenue is to keep hollering that racism is the epitome of what is keeping us down. Yet those who tell them that will be with us at the Jockey Club tonight.

Senator GRASSLEY. Thank you.

Senator SIMON. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Woodsen, let me direct my first question to you. I believe you were present when the five Congressmen testified, correct?

Mr. WOODSEN. Yes, I was.

Senator SPECTER. And the five Congressmen testified in opposition to Judge Thomas, on the basis that he was not a good role model, since he was the beneficiary of affirmative action and, once he had attained his status, he was turning his back on other African-Americans.

You have suggested that the opposition by that group was really directed in a political context, that they are the beneficiaries of having African-Americans to support the Democratic Party, as opposed to looking for a role model like Judge Thomas who, in his speeches, was very direct about wanting to bring more African-Americans to the conservative cause and more African-Americans to the Republican Party.

Are you saying that the opposition by the congressional panel was really based on Democratic/Republican politics?

Mr. WOODSEN. I think, in part, it was, Senator. It was based also, in part, as Mr. Jackson said, any black that does not characterize other blacks as being victims of white oppression and believes that

the mugger might have knocked him down, that is, racism, but it is the responsibility of the person mugged to get up, the victim's responsibility to get up, and I have debated most members over the years

To espouse this puts you at odds politically and ideologically with members of the caucus, and, yes, I think Clarence Thomas, because of his position on civil rights, challenging—again, Senator, I disagree with the characterization that Clarence Thomas is against affirmative action and civil rights. He is not. Even Ben Hooks affirms that, when he says, in cases of individual discrimination, Judge Thomas will nail you to the wall.

Where Judge Thomas disagrees or has some problems with it is when remedies are applied to groups, so I think that it is in that context where there is some debate, and I think what he is trying to do, and some of us are trying to find some middle ground to find out what do we do about the blacks who are locked out, because of race and economic and social circumstance, and I think Judge Thomas is grappling for alternative questions to be raised, and a lot of the members of the Caucus just simply do not want those questions raised.

Senator SPECTER. Mr. Woodsen, the Congressmen criticized Judge Thomas on the ground that he was a beneficiary of affirmative action. But he did not want to see it extended to others, and I do not know if you heard the testimony—

Mr. WOODSEN. I did.

Senator SPECTER [continuing]. But Judge Thomas did say that, when it came to employment, and there was considerable discussion about the very famous discrimination case in New York City on Local 28 of the building trades, which had been going on for more than 20 years, with a finding of egregious discrimination. Judge Thomas held back and said that he would grant a remedy for any specific individual who was discriminated against, but in terms of looking to the future, in a context where you knew with virtually certainly that the next group of African-American applicants would be discriminated against, and, as one of the Congressmen put it, you wanted to give some of the tail-wind to the head-wind which was going to face that African-American who was going to look for the job. Don't you think that, just as preference is desirable, as Judge Thomas said in the educational context, which he received, that there ought to be a preference for the next applicant, say, in the New York City context, where you have every reason to expect discrimination, as the prior applicants had been discriminated against?

Mr. WOODSEN. Senator, you have taken me into the details of that particular case that are beyond my knowledge, but I can say to you that the fact that when Secretary Donovan was facing trial, the trial judge, in ruling against or setting aside one of the charges against him of using a prominent black elected official as a dummy 8(a) firm, that the practice is so widespread that you could not hold Secretary Donovan culpable in that situation. I think that is the kind of situation, at least, that I think requires some review and some discussion and some debate as to who are the true beneficiaries of some of these group remedies. And I think all Judge Thomas was trying to do, as I and the rest of us are trying to do, is

to try to begin to raise a new set of questions, instead of just relying upon some of the same set-aside remedies.

I remember contracts that get set-aside contracts bid on a contract \$30 million, and because they are black, they get the contract, they take \$2 million and then subcontract with the white firm that came in second and that firm hires all-white employees, while this one black contractor has \$2 million.

Now, is this really what we intended through affirmative action, or did we really intend to improve, increase the number of workers and people participating? I think those are the situations, Senator, that we need to look into.

Senator SPECTER. Mr. Jackson, let me direct this question to you, where a major point was made by the Congressmen who testified, in response to my questions, if Judge Thomas is a good role model. They were highly critical of Judge Thomas, because of the statements he had made about his own sister, and were highly critical of him, because he was unwilling to see affirmative action benefit others as affirmative action had benefited him.

Do you consider those factors to be relevant in evaluating whether Judge Thomas would be a good role model for other young African-Americans in this country?

Mr. JACKSON. Senator, first, let me say this: Knowing Clarence as I do and his family, Clarence and his sister are extremely close. I think that was a philosophical difference at a point in time between the two and that has not in any way daunted their relationship. I think that probably every one of us has had some differences with our different brothers and sisters.

Second, Clarence Thomas has made it clear in the days of his testimony here that he supports affirmative action, so those who will basically tend to distort the reality of the situation is doing that basically to serve their own interests.

Lastly, I was very pained to listen to many of the members of the Black Caucus come out as they did sitting at this table today against a man that I know very well and have a great deal of affinity for and I think is an excellent human being, with a tremendous amount of compassion.

But I think a few minutes ago, I said, when Senator Hatch asked the question, that you must understand it in the overall context that we are still operating in a victimized situation, and when someone comes in and challenges the philosophical viewpoint that we are victims and we will remain victims and there is nothing that we can do, the only recourse that must occur is they cannot deal with them from an academic or philosophical viewpoint, so, therefore, it becomes very personal, and it saddens me to hear them say that they do not believe that Judge Thomas would be a role model.

I must tell you a story that they did on the Today Show not 2 weeks ago about a young African-American boy, in Savannah, GA, who had no hope. For 2 years, Judge Thomas has been writing him letters, sent him a set of encyclopedias, sending him a book every month. That young African-American's grades have gone up tremendously. He has set his sights on being a doctor. Had Clarence ignored his letter, he might have been doomed to defeat. To say that Clarence Thomas as a man is not a role model is to basically

say that young boy in Savannah, GA has no substance, and I think he has a great deal of substance.

Senator SPECTER. Mr. Jackson, you testified that Judge Thomas is in favor of affirmative action. I am not so sure you are right about that, but it may depend upon definitions and it may depend upon scope. There is a very limited preference that Judge Thomas testified to here during the course of the proceedings on disadvantage in an educational context. He testified very forcefully about being against discrimination, as you find the specific victims of discrimination. But if Judge Thomas was not in favor of affirmative action, would you still support his nomination for the Supreme Court?

Mr. JACKSON. If he was not in favor of affirmative action?

Senator SPECTER. Correct.

Mr. JACKSON. I have to tell you that I think that is a very hypothetical question, and my answer would be that I know he is in favor of it, so, therefore, I would support him wholeheartedly.

Senator SPECTER. Well, OK, but I am not so sure he is in favor of affirmative action, so it leaves you, at least in my mind, in equipoise on the hypothetical. [Laughter.]

Mr. JACKSON. Let me say this, Senator: I am a firm believer in affirmative action. I have three degrees and I am convinced that affirmative action played a role in those degrees, but I also had to do a lot on my own to make sure that I got them.

Clarence Thomas is a beneficiary of affirmative action, I don't think he denies that, but he had to do a lot on his own. But I think today, Senator, for us to be misled and for us to consistently deal with one aspect of affirmative action, as many of the groups that have appeared before you and will appear after us want you to do, would be to overlook the real issue that is facing us today.

In 1976, we had almost 800,000 African-American males and females in college. In 1991, we have a little over 300,000 in college. In many cases, affirmative action has not stopped, but what has occurred is there has been a breakdown somewhere, in our school system, in the raising of our kids. So even tomorrow, as I said earlier, if you say we are going to practice affirmative action the best way that we know how, when you have African-American kids leaving school, reading at a fifth grade level and doing math at a third or fourth grade level, affirmative action, in my mind, becomes a moot question, until we do something about making sure that we benefit those kids who are suffering greatly in our communities and in the cities.

I see those kids every day, as an executive director of the public housing agency, and I am saying to you that what we need to do is begin to raise those persons up, and I can tell you, if we do that, affirmative action will not be a necessary issue, the issue will be how can we stop African-Americans from ascending to the highest ranks in this country.

I think, lastly, I would say this to you: There have been so many excuses made. I always use the analogy that 20 years ago, at the end of the Vietnam War, we had refugees coming from all over Southeast Asia, they could not speak English. But because there was a system in place where the family was strong, where we did not have people making excuses for them, in those same inner-city

schools that African-Americans and Hispanics are suffering in, the Asians are topping out of the class.

So, I am saying to you that some responsibility must lie with what we are doing, especially us at this table who have been beneficiaries of affirmative action. We must do our job and that is not in any way to dismiss or deny that racism exists and that affirmative action has played a role.

Senator SPECTER. Thank you very much, gentlemen, and thank you, Mr. Chairman.

Senator SIMON. We want to thank all three of you for your testimony. Let me just add, if I may have the attention of Senator Thurmond here, we have averaged 37 minutes a witness. We have 27 witnesses to go. If we keep up the current pace, we will be here until about 9 tomorrow morning.

Until Senator Biden gets back, I wonder if we could agree to just have 5 minutes for members' questions rather than the current 10 minutes.

Senator THURMOND. I certainly think it ought to be restricted as much as possible.

Senator SIMON. OK, so there is no objection. At least until Senator Biden gets back, we will limit it to 5 minutes per member.

We thank the three of you. Our next panel is a panel supporting Judge Thomas: Pamela Talkin, a member of the Federal Labor Relations Authority and former chief of staff for Judge Thomas while he chaired the EEOC; Ms. Willie King from the Equal Employment Opportunity Commission. Ms. King was director of the Financial Management Division of the EEOC during then Chairman Thomas' tenure. James Clyburn, Commissioner of the South Carolina Human Affairs Commission, who is here on behalf of the International Association of Official Human Rights Agencies, which is the Association of State Fair Employment Agencies; and Dr. Talbert Shaw, the president of Shaw University.

We are happy to have all of four of you here. Ms. Talkin, we will start with you, if we may, and we will enter your full statements in the record. We will limit the witnesses to five minutes.

Should we start with you, Ms. Talkin, or however you would prefer?

Ms. TALKIN. Dr. Shaw has to leave and catch a plane, and he has been moved on to this panel so—

Senator SIMON. Dr. Shaw, we will start with you, and I will during my temporary reign here as Chair be firm on the 5-minute rule.

Dr. Shaw.

**STATEMENTS OF A PANEL CONSISTING OF TALBERT SHAW, PRESIDENT, SHAW UNIVERSITY; PAMELA TALKIN, FEDERAL LABOR RELATIONS AUTHORITY; WILLIE KING, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; AND JAMES CLYBURN, COMMISSIONER, SOUTH CAROLINA HUMAN AFFAIRS COMMISSION**

Mr. SHAW. Mr. Chairman, distinguished members of this Judiciary Committee, I am Talbert Shaw, president of Shaw University in North Carolina, and I deeply appreciate this opportunity to testi-

fy before you in support of the appointment of Judge Clarence Thomas to the U.S. Supreme Court.

Although I do express today opinions of my own, it is significant that I speak as the president of Shaw University, an historically black liberal arts coeducational institution founded in 1865, fully accredited by the Southern Association of Colleges and Schools, and presently offering baccalaureate degrees in major academic disciplines to over 2,000 students.

I do not appear before you distinguished legislators claiming any expertise in American jurisprudence. Although philosophy is my academic discipline, I do bring a keen interest in history; generally, in American history, in particular, especially that aspect of our history that focuses on the evolution and development of democratic principles, principles that seek objectivity, equality, and justice, all representing a quest for the common good.

It is a common good predicated on objectivity; that is, allowing the facts to speak for themselves, but a good which fosters opportunity. When the facts have spoken, they should be allowed to come to fruition. This, I believe, is the foundation of the American dream of economic and spiritual well-being. It is a dream predicated on equal opportunity fueled by preparation and competence.

It seems convincing that if these indices of preparation, competence, and opportunity are applied in determining Judge Thomas' eligibility to serve on the Supreme Court, he could easily pass the test. Judge Thomas brings to the bench impeccable credentials. He holds a law degree from Yale University Law School, one of the most distinguished institutions of the country. Thus, objectivity in assessing the judge's credentials easily gives him an excellent grade. Therefore, his preparation to be a distinguished jurist is beyond question based on his academic credentials.

In addition to academic credentials, experience has also prepared the nominee for this day. Having served as assistant attorney general in the State of Missouri, legislative assistant to Senator Danforth, legal officer with the Office of Civil Rights in the Department of Education, chairman of the Equal Employment Opportunity Commission, and now judge in the D.C. Court of Appeals, which is considered the second highest Federal court, Judge Thomas' profile of service reveals a convincing progression of his appropriate professional ladder.

In fact, his experience as a Georgia youth in the days of severe racism reminds him that he grew up in the other America where one is never allowed to forget his black skin and that one never escapes the ghetto, whether one lives on a farm in Georgia or sits on the U.S. Supreme Court in the District of Columbia.

In his own words which appeared in the Atlantic magazine in 1988, and quoted in Jet on May 22, 1991, page 8, Judge Thomas states,

There is nothing you can do to get past your black skin. I don't care how educated you are, how good you are at what you do. You will never have the same contact or opportunities.

However, because of his credentials, his experience and ambition, an opportunity is knocking at his door today. It is an opportunity deeply embedded in the American dream which says that compe-

tence, industry, and creativity will be rewarded. That dream instilled in him by his parents kept hope alive in the long journey of 43 years along that circuitous path from Pin Point, GA, to hopefully the highest court of our land.

With credentials and experience documented, with an inescapable past that will keep him tied to his roots, thus sensitive to the struggles of the other America, Judge Thomas' appointment to the U.S. Supreme Court is further legitimized by its symbolic significance.

This point is very important here. A Nation with such ethnic diversity as America should consciously seek representation of all its citizens in the halls of justice. It further symbolizes that the American dream is achievable. It says to every American that regardless of race, creed or color, you can dream the impossible dream, you can climb every mountain.

Now, neither am I disturbed by the evolutionary process evidenced in the judge's thinking on a variety of legal and social issues.

Senator SIMON. If you could conclude your statement now, the 5 minutes is up.

Mr. SHAW. Yes, sir, I am concluding it right now.

The posture of growth that we find in the gentleman is saying that intellectual honesty suggests that we maintain a posture of openness so that we need not be frozen to the past, and this is a strong point that has been raised over and over again. Will the real Thomas stand up? We are saying that the man is open and he need not be tied to the frozen positions of the past, and I think this is one of the very strong points in his candidacy for this great position.

[The prepared statement of Mr. Shaw follows:]

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE  
IN SUPPORT OF JUDGE CLARENCE THOMAS

BY

TALBERT O. SHAW, PRESIDENT  
SHAW UNIVERSITY  
RALEIGH, NORTH CAROLINA

MR. CHAIRMAN, AND DISTINGUISHED MEMBERS OF THIS JUDICIARY COMMITTEE, I AM TALBERT O. SHAW, PRESIDENT OF SHAW UNIVERSITY IN RALEIGH, NORTH CAROLINA, AND I DEEPLY APPRECIATE THIS OPPORTUNITY TO TESTIFY BEFORE YOU IN SUPPORT OF THE APPOINTMENT OF JUDGE CLARENCE THOMAS TO THE U.S. SUPREME COURT.

ALTHOUGH I DO EXPRESS, TODAY, OPINIONS OF MY OWN, IT IS SIGNIFICANT THAT I SPEAK AS THE PRESIDENT OF SHAW UNIVERSITY, AN HISTORICALLY BLACK, LIBERAL ARTS, COEDUCATIONAL INSTITUTION, FOUNDED IN 1865, FULLY ACCREDITED BY THE SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS, AND PRESENTLY OFFERS BACCALAUREATE DEGREES IN MAJOR ACADEMIC DISCIPLINES TO OVER 2,000 STUDENTS.

I DO NOT APPEAR BEFORE YOU, DISTINGUISHED LEGISLATORS, CLAIMING ANY EXPERTISE IN AMERICAN JURISPRUDENCE, ALTHOUGH PHILOSOPHY IS MY ACADEMIC DISCIPLINE; BUT I DO BRING A KEEN INTEREST IN HISTORY, GENERALLY AND AMERICAN HISTORY IN PARTICULAR, ESPECIALLY THAT ASPECT OF OUR HISTORY THAT FOCUSES ON THE EVOLUTION AND DEVELOPMENT OF DEMOCRATIC PRINCIPLES, PRINCIPLES THAT SEEK OBJECTIVITY, EQUALITY AND JUSTICE, ALL REPRESENTING A QUEST FOR THE COMMON GOOD. IT'S A COMMON GOOD PREDICATED ON OBJECTIVITY, I.E., ALLOWING THE FACTS TO SPEAK FOR

THEMSELVES, BUT A GOOD WHICH FOSTERS OPPORTUNITY, I.E., WHEN THE FACTS HAVE SPOKEN, THEY SHOULD BE ALLOWED TO COME TO FRUITION. THIS, I BELIEVE, IS THE FOUNDATION OF THE AMERICAN DREAM OF ECONOMIC AND SPIRITUAL WELL-BEING. IT IS A DREAM PREDICATED ON EQUAL OPPORTUNITY FUELED BY PREPARATION AND COMPETENCE.

IT SEEMS CONVINCING THAT IF THESE INDICES OF PREPARATION, COMPETENCE, AND OPPORTUNITY ARE APPLIED IN DETERMINING JUDGE THOMAS' ELIGIBILITY TO SERVE ON THE SUPREME COURT, HE WOULD EASILY PASS THE TEST. JUDGE THOMAS BRINGS TO THE BENCH IMPECCABLE CREDENTIALS. HE HOLDS A LAW DEGREE FROM YALE UNIVERSITY LAW SCHOOL, ONE OF THE MOST DISTINGUISHED INSTITUTIONS IN THE COUNTRY. OBJECTIVITY IN ASSESSING THE JUDGE'S CREDENTIALS EASILY GIVES HIM AN EXCELLENT GRADE. THEREFORE, HIS PREPARATION TO BE A DISTINGUISHED JURIST IS BEYOND QUESTION.

IN ADDITION TO ACADEMIC CREDENTIALS, EXPERIENCE HAS ALSO PREPARED THE NOMINEE FOR THIS DAY. HAVING SERVED AS ASSISTANT ATTORNEY GENERAL IN THE STATE OF MISSOURI, LEGISLATIVE ASSISTANT TO SENATOR DANFORTH, LEGAL OFFICER WITH THE OFFICE OF CIVIL RIGHTS AT THE DEPARTMENT OF EDUCATION, CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND NOW JUDGE IN THE D.C. COURT OF APPEALS, WHICH IS CONSIDERED THE SECOND HIGHEST FEDERAL COURT, JUDGE THOMAS' PROFILE OF SERVICE REVEALS A CONVINCING PROGRESSION UP HIS APPROPRIATE PROFESSIONAL LADDER.

IN FACT, HIS EXPERIENCE AS A GEORGIA YOUTH IN THE DAYS OF

SEVERE RACISM REMINDS HIM THAT HE GREW UP IN THE "OTHER AMERICA," WHERE ONE IS NEVER ALLOWED TO FORGET HIS BLACK SKIN, AND THAT ONE NEVER ESCAPES THE GHETTO WHETHER ONE LIVES ON A FARM IN GEORGIA OR SITS ON THE U.S. SUPREME COURT. IN HIS OWN WORDS WHICH APPEARED IN THE ATLANTIC MAGAZINE IN 1988 AND QUOTED IN JET, MAY 22, 1991, PAGE 8, JUDGE THOMAS STATES, "THERE IS NOTHING YOU CAN DO TO GET PAST YOUR BLACK SKIN. I DON'T CARE HOW EDUCATED YOU ARE, HOW GOOD YOU ARE AT WHAT YOU DO. YOU WILL NEVER HAVE THE SAME CONTACT OR OPPORTUNITIES."

HOWEVER, BECAUSE OF HIS CREDENTIALS, EXPERIENCE, AND AMBITION, AN OPPORTUNITY IS KNOCKING AT HIS DOOR TODAY. IT IS AN OPPORTUNITY DEEPLY EMBEDDED IN THE AMERICAN DREAM WHICH SAYS THAT COMPETENCE, INDUSTRY, AND CREATIVITY WILL BE REWARDED. THAT DREAM INSTILLED IN HIM BY HIS PARENTS KEPT HOPE ALIVE IN THE LONG JOURNEY OF 43 YEARS ALONG THAT CIRCUITOUS PATH FROM PINPOINT, GEORGIA TO, HOPEFULLY, THE HIGHEST COURT OF OUR LAND.

WITH CREDENTIALS AND EXPERIENCE DOCUMENTED, WITH AN INESCAPABLE PAST THAT WILL KEEP HIM TIED TO HIS ROOTS, THUS SENSITIVE TO THE STRUGGLES OF THE "OTHER AMERICA," JUDGE THOMAS' APPOINTMENT TO THE U.S. SUPREME COURT IS FURTHER LEGITIMIZED BY ITS SYMBOLIC SIGNIFICANCE. A NATION WITH SUCH ETHNIC DIVERSITY SHOULD CONSCIOUSLY SEEK REPRESENTATION OF ALL ITS CITIZENS IN THE HALLS OF JUSTICE. IT FURTHER SYMBOLIZES THAT THE AMERICAN DREAM IS ACHIEVABLE; IT SAYS TO EVERY AMERICAN THAT REGARDLESS OF RACE, CREED OR COLOR, "YOU CAN DREAM THE 'IMPOSSIBLE' DREAM, YOU CAN CLIMB EVERY MOUNTAIN."

NEITHER AM I DISTURBED BY THE EVOLUTIONARY PROCESS EVIDENCED IN THE JUDGE'S THINKING ON A VARIETY OF LEGAL AND SOCIAL ISSUES, FOR INTELLECTUAL DISHONESTY INVOLVES CLINGING TO OUT-DATED OPINIONS DESPITE CONVINCING EVIDENCE TO THE CONTRARY. OPENNESS, THE POSTURE FOR GROWTH IN A WORLD OF NOVELTY AND CHANGE IS THE ONLY HONEST INTELLECTUAL ATTITUDE TO ASSUME IN THE MARKETPLACE OF IDEAS. ESPECIALLY IS THIS TRUE IN THE INEXACT SCIENCES, LIKE JURISPRUDENCE, WHERE INTERPRETATION IS THE METHODOLOGY OF PRACTICE IN QUEST OF UNDERSTANDING AND TRUTH. UNREADINESS TO ASSUME INFLEXIBLE POSITIONS ON LEGAL ISSUES COMPLICATED BY TIME AND CIRCUMSTANCE IS, IN MY OPINION, INTELLECTUALLY MATURE, AND PROCEDURALLY APPROPRIATE. AGAIN, IF THE JURISTS INTERPRETATION OF LAW IS INFORMED BY GENERAL PRINCIPLES AND SPECIFIC SITUATIONS, THEN THERE IS A DIALECTIC WHICH PROVIDES SPACE FOR SUBJECTIVITY ON WHICH GROUNDS APPEAL COURTS OVERTURN LOWER COURT DECISIONS. IT IS THIS ARENA OF INTERPRETATION THAT LEGITIMIZES SHIFTS IN OPINIONS IN THE LIGHT OF NEW EVIDENCE, FOR "TIME MAKES ANCIENT GOOD UNCOUTH."

THEREFORE, DISTINGUISHED MEMBERS OF THE JUDICIARY COMMITTEE, ON SUCH GROUNDS AS ACADEMIC CREDENTIALS, EXPERIENCE, SYMBOLIC SIGNIFICANCE, AND INTELLECTUAL HONESTY, I STRONGLY RECOMMEND THE CONFIRMATION OF JUDGE CLARENCE THOMAS FOR THE UNITED STATES SUPREME COURT.

THANK YOU.

ON CLARENCE THOMAS

Last night as I watched CNN report on hearings of this past Tuesday, I was encouraged to hear testimony of Dean Guido Carbaresi of Harvard Law School express the need for openness in the quest for truth, and that inflexible pre-established positions on complex legal issues is intellectually irresponsible, and could in fact be pragmatically dishonest.

A Supreme Court Justice with such pre-packaged attitudes would provide a great disservice to the American people. I had already written my testimony before hearing the Harvard Law Dean and thus was greatly comforted to hear my position affirmed by such a distinguished scholar.

Perhaps the Clarence Thomas, who brackets his previous positions and opinions in the quest for clarity and truth, assuming a willing posture to adjust his thinking as facts and circumstances dictate, is the most promising nominee for the highest court of our land in recent years. Resisting the temptation to nurture frozen and predictable judgments on complicated legal and social issues that plague the American people, Judge Thomas, if confirmed, could be a new refreshing voice on the Supreme Court and could possibly initiate a new era in American jurisprudence where such mischievous and nonenlightening labels as conservative and liberal are relegated to the dustbins of legal history.

Senator SIMON. We thank you for your testimony. We will enter your full statement in the record.

Ms. Talkin.

#### STATEMENT OF PAMELA TALKIN

Ms. TALKIN. Thank you, Mr. Chairman, Senators.

For some 10 weeks now, including today, I have heard the relentless repetition of various inaccurate assertions regarding Judge Thomas and his tenure at EEOC. Those statements do not describe either the man or the agency that I know.

There really should be no mistake about it. As chairman of the EEOC, Judge Thomas sought to vigorously enforce all the laws prohibiting discrimination on behalf of all workers, including women, older workers and Hispanic Americans. In fact, the record establishes that the EEOC came of age during the tenure of Chairman Thomas.

I was somewhat taken aback when Clarence Thomas, then chairman of EEOC, asked me, a Democrat and a politically correct career civil servant, to be his chief of staff. But it soon became apparent that we did share a commitment to equal employment opportunity, a commitment to the full protection of workers' rights, and the common goal of making EEOC a credible and aggressive law enforcement agency.

When Judge Thomas asked me to be his chief of staff, he concentrated on my law enforcement experience. He ignored by party affiliation and never questioned me as to my philosophical views. My strict and single mandate from Judge Thomas was to help him make the EEOC effective, and I believe he did make it effective.

The Thomas EEOC fully investigated more cases, filed more lawsuits, and that is more individual lawsuits and more class actions, than ever before, and received more damages on behalf of victims of discrimination—over \$1 billion—than ever before. The Thomas Commission achieved that with inadequate funding and under severe staffing restrictions.

For the first time, charges were fully investigated and full redress was sought for victims of discrimination. No more would the EEOC merely make perfunctory inquiries and then settle meritorious claims for 10 cents on a dollar and a neutral employment reference. Victims of discrimination were to receive back pay, and those unlawfully deprived of a livelihood were to get a job.

In the past, the EEOC field offices made unreviewable determinations to prosecute only a small number of cases. Under Judge Thomas, all cases in which the law had been violated were submitted to the Commission for litigation. No longer would the EEOC tell people that although they had been discriminated against, their case was too small or unimportant for the government to prosecute.

Some have mistakenly assumed that this increased effort on behalf of individual claimants represented a shift away from concern about the systemic discrimination that results from patterns and practices of employment. Well, it is simply not true. Judge Thomas sought to improve the handling of all cases at EEOC, including the systemic cases. He revitalized our systemic program.

In 1981, there was one systemic case in active litigation. In 1988, there were 16 such cases in active litigation, and 100 more under investigation. If not settled, then they could be litigated, too.

In addition, the EEOC on its own initiative broadened hundreds of individually-filed claims into class actions. As a matter of fact, the number of class action suits doubled during the tenure of Clarence Thomas.

Many have expressed a concern about whether Judge Thomas can separate his philosophical views from his official obligations. Well, I can tell you that Judge Thomas approved dozens of settlements which provided for the use of goals and timetables, and that is despite his now well-publicized and then well-publicized views regarding the efficacy of such measures. As an aside, I should note that even the potential use of goals and timetables arose in probably one-half of one percent of the 60,000 cases the EEOC handled annually.

Another example of Judge Thomas' ability to always carry out his official duties is in the area of affirmative action, not goals and timetables, as a remedy. We govern the Federal sector, and I know there has been a lot of discussion about *Johnson v. Santa Clara*, but we required every federal agency to also submit affirmative action plans, including goals and timetables, based upon the standards set forth in *Johnson v. Santa Clara*.

It is difficult to compress 8 years of accomplishments into 5 minutes of testimony. I won't try to discuss the many other innovative programs that Judge Thomas adopted to enhance our enforcement capabilities or to discuss the tremendous management strides he made.

I can only say that I know that Judge Thomas has a strong belief in the principles of equal employment opportunity; that he has a clear understanding of the need for affirmative steps to be taken to ensure such opportunity, and he obviously has a knowledge of the debilitating effects of discrimination.

I am proud to be a public servant. I have been for more than 20 years, and I can tell you that in more than 20 years of public service I have never met a public official, or actually any public servant, for that matter, who was more encouraging and tolerant of diversity of opinion and background.

I know that many of the Senators—I see the red light is on. I will finish. I know that Senator DeConcini had questions regarding Hispanic-Americans. I am prepared to answer that or any of the other questions that the Senators might have. Thank you for this opportunity.

[The prepared statement of Ms. Talkin follows:]

Testimony of Pamela Talkin

Mr. Chairman, Senators:

Thank you for the opportunity to testify at this proceeding.

My name is Pamela Talkin and I am currently a Member of the Federal Labor Relations Authority. From October 1986 through November 1989 I served as Chief of Staff of the Equal Employment Opportunity Commission reporting directly to then-Chairman Clarence Thomas.

For some time now I have listened to the relentless repetition of inaccurate assertions regarding the EEOC and Clarence Thomas. Those statements do not describe the agency or the man that I know. Let there be no mistake about it; as Chairman of the EEOC, Judge Thomas vigorously and effectively enforced all the laws against employment discrimination. Indeed, the record establishes that the EEOC came of age under the leadership of Clarence Thomas. As his Chief of Staff, I witnessed many of these developments as they occurred.

Why would the Republican Chairman of the EEOC ask me, a Democrat and a career Federal employee, to be his Chief of Staff? And why would a "politically correct" civil servant such as myself accept the position? The reasons are clear. We shared an abiding commitment to equal employment opportunity and the full protection and vindication of the rights of women, minorities, older Americans and workers with disabilities and a common goal of making the EEOC a credible and aggressive law enforcement agency. When he hired me as his Chief of Staff, Judge Thomas concentrated on my years of NLRB law enforcement experience, ignored my party affiliation and did not question me as to my philosophical views; my strict and single mandate from then-Chairman Thomas was to help him in making the EEOC effective.

Judge Thomas missed no opportunity to forcefully advise all EEOC employees that he expected no less than the same commitment from them. And EEOC employees were glad to live up to that expectation because they understood that Clarence Thomas desired and would encourage, permit and reward their best efforts toward that goal no matter what role the employees played and no matter what their age, color or gender.

During Clarence Thomas' tenure as Chairman, the EEOC fully investigated more cases, filed more legal actions and recovered more damages for victims of discrimination than at any other time in the agency's history. The Thomas Commission went to court on behalf of workers 60% more often than in previous years and collected a billion dollars on behalf of American workers, an amount far greater than that of any comparable period. These accomplishments were achieved in spite of inadequate funding and severe staffing restrictions.

For the first time in the agency's history, policies were adopted providing for all charges of discrimination to be thoroughly investigated and for the EEOC to seek full redress for all victims of discrimination. No longer would the agency simply make perfunctory inquiries and then settle meritorious claims for 10 cents on the dollar and a neutral employment reference. Workers who were unlawfully deprived of a livelihood were to receive a job and full backpay. And as a deterrent to future violations of the law, those who engaged in discrimination would be and were required to take such affirmative steps as retraining or discharging offending supervisors, eliminating unlawful practices and posting notices to employees to advise them of their rights and assure them that those rights would not again be

violated. There was no compromise in the EEOC's enforcement efforts.

In contrast to the past, when EEOC field offices made selective and unreviewable determinations to prosecute only a small number of cases found to have merit, under Judge Thomas the EEOC determined that all cases in which the law had been violated would be submitted to the Commission members for litigation consideration. People would no longer be told that although they had been discriminated against, the EEOC would not pursue their complaint. Now victims of discrimination did not have to search for an attorney who might handle their case for fees they could hardly afford; the government would vindicate their rights and enforce the law on their behalf. The message was clear; justice was to be achieved in every case.

Some have mistakenly assumed that the EEOC's increased efforts on behalf of individual workers constituted a shift away from concern about the continued existence of broad-based systemic discrimination resulting from employment patterns and practices within businesses or industries. To the contrary, Judge Thomas sought to improve the EEOC's handling of all cases. To that end he restructured and revitalized the EEOC's systemic program.

In 1981 the EEOC had only one broad systemic, pattern and practice case in active litigation. In 1988 the Commission had 103 such cases in various stages of investigation; 16 in active litigation. Moreover, the EEOC, on its own initiative, actively prosecuted, as broad class actions, hundreds of cases that had been filed as individual claims.

In accordance with established legal precedent, in pattern and practice cases Clarence Thomas voted, along with his fellow Commission members, to approve settlements which provided for the use of goals and timetables, despite his now well-publicized personal views regarding the efficacy of such measures. Reasonable people can and do, of course, differ with Judge Thomas' views on the utility of goals and timetables in certain circumstances. It should be noted, however, that cases involving even the potential use of such measures constituted less than one-half of one percent of the over 60,000 cases filed annually with the EEOC. Differences of opinion over the effectiveness of this one form of affirmative action, valid as they may be, cannot serve as a legitimate basis for assertions that Judge Thomas did not enforce the laws ensuring equal opportunity and prohibiting discrimination.

Judge Thomas was and remains committed to identifying, attacking and eliminating patterns and practices of

discrimination and all arbitrary barriers and obstacles to equal opportunity. Not only were millions of dollars in damages secured in individual and systemic cases but innovative approaches were taken to ensure that subtle barriers and obstacles to equal employment would also be eliminated. Major corporations were required to actively recruit minorities and women and to set aside millions of dollars for the training of minority and women employees and for the establishment of dozens of scholarship funds. All Federal agencies were required to analyze their workforce profile and workplace policies and to submit to the EEOC, along with goals and timetables, affirmative action plans that identified barriers to the full employment of minorities, women and employees with disabilities and that detailed what steps would be taken to remove those obstacles.

Judge Thomas' belief in the principles of equal opportunity, the need for affirmative action to ensure such opportunity and the debilitating effects of discrimination informed all his efforts as Chairman of the EEOC. He constantly sought to reach out and educate members of the public as to their rights and responsibilities under the law and the benefits to business and our country of ensuring that all Americans be permitted to contribute to their full potential. His commitment was apparent in his own approach

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to the employees of the EEOC. Women, employees with disabilities, older workers, Hispanic-Americans, Asian-Americans, African-Americans and other minorities were affirmatively and actively recruited, trained and promoted. No other Federal agency had as high a percentage of women and members of various racial and ethnic minorities in professional and managerial positions. In over 20 years of public service, I have never observed anyone who was more respectful, tolerant and encouraging of diversity of background and opinion than Clarence Thomas was at the EEOC.

When he became Chairman in 1982, Clarence Thomas found an EEOC in disarray. At the time, the General Accounting Office reported that the EEOC's finances were in shambles and its case processing was in a state of "complete chaos." The Office of Personnel Management had concluded that the work environment at EEOC was "beset by acrimony, improper employee conduct, poor performance and favoritism." Judge Thomas introduced sound financial management, established reliable recordkeeping procedures, completely automated operations, developed appropriate and fair personnel and performance evaluation systems, and streamlined the bureaucracy at the EEOC.

Clarence Thomas not only built the EEOC's infrastructure, but by virtue of his unstinting efforts and

enormous commitment to equal opportunity and the law, he also succeeded in transforming the EEOC into a respected and highly professional agency that enforced all the laws entrusted to it.

No one was more dismayed than Clarence Thomas when the evolving EEOC did not, on occasion, live up to its own enhanced expectations. As he often stated, we at the EEOC had to build our wagon while we were riding in it and, in those circumstances, with 50 field offices and over 3,000 employees, mistakes and failures sometimes occurred. Clarence Thomas recognized and took full responsibility for such shortcomings and renewed and redoubled his efforts to make the EEOC a formidable opponent of those who would violate the laws prohibiting discrimination.

Today's Equal Employment Opportunity Commission is a fitting and lasting tribute to Clarence Thomas' vision and his unwavering commitment to upholding the laws protecting American workers.

Senator SIMON. Thank you.  
Ms. King.

#### STATEMENT OF WILLIE KING

Ms. KING. Thank you, Mr. Chairman, for giving me this opportunity.

I am Willie King, financial manager of the U.S. Equal Employment Opportunity Commission. I have been working in civil rights for approximately 30 years. My career in civil rights began at the Southern Christian Leadership Conference in February of 1962 in Atlanta, GA.

I won't speak to my activities in civil rights. I have three letters signed by the Rev. Dr. Martin Luther King, Jr., that I think will fully explain my civil rights activities. I have worked for EEOC for almost 26 years. I am one of the first employees to be hired by the Commission.

I am happy to say that I know Judge Thomas and that I have worked with him at the Equal Employment Opportunity Commission during his tenure as chairman. When Judge Thomas became chairman of the EEOC, there was an uneasy feeling in the finance and accounting office. Clearly, we had reason to be apprehensive because the General Accounting Office [GAO] had just issued a report criticizing every aspect of the agency's financial operation, from paying of the bills, accounting for travel advances, issuing travel checks, and issuing accounting reports.

The staff was sure that someone would be pointed out to Mr. Thomas and blamed. To our surprise, he tolerated neither blame nor finger-pointing. Rather, he wanted to know what it would take to clean up the financial operation and how long. He promised his full support and expressed his confidence in the employees working in finance.

Judge Thomas kept his word. He gave us clear expectations, moral support, and provided us with the necessary equipment to do our jobs. As a result, in May 1984, approximately 2 years after he became chairman, the GAO approved our accounting system. This was accomplished in record time because of the support and leadership provided by Judge Thomas.

Judge Thomas regularly stopped by the finance office to thank employees personally for doing a good job. Occasionally he would bring some young protege to my office, show them the operation, and ask me to explain to them the civil rights movement. Judge Thomas saw the agency and its mission as a direct result of the civil rights struggle.

The clerical and support staff at EEOC had a special relationship with Judge Thomas. He connected with employees at all levels. He established a rapport and received genuine and positive feedback because he cared about the people. The morale at EEOC was at an all-time high during his administration. The secretarial and resources star board that was started under his administration is still a viable and integral part of the day-to-day secretarial staff at EEOC.

Judge Thomas is a very compassionate man. He took interest in the less fortunate and the little people. He showed concerns for the

plight of working women and minorities. During his tenure as Chairman of EEOC, many women and minorities were recruited for and promoted to high level positions. Some were office directors, senior executive service, and high level secretaries.

In one service area alone, four black females were promoted to director at the same time. Only one of those women had a college degree. He took a chance on them because they had demonstrated the ability to do their jobs in an outstanding manner, and he remembers where he came from.

Judge Thomas also had an interest in people such as the handyman and single mothers. He was concerned about families, and he gave encouraging words when there were problems. He encouraged college students to do their best, telling them that B grades were not acceptable, to strive for A's.

Judge Thomas made older workers feel at ease by regularly stopping by and greeting them. One employee in the financial management division followed him out of the office crying when he left. The employees even dedicated the headquarters office building to Judge Thomas in appreciation for his outstanding contribution to EEOC and its mission. He was there for people in need.

In addition to the financial management improvements made under Judge Thomas, EEOC made monumental improvements in the areas of budget execution and formulation, administrative services such as personnel management. We have received thousands of dollars in rebates on our telecommunications area. We have made improvements in space management and automation. Just this past July, EEOC received the prestigious Outstanding Property Managers of the Year Award.

Senator SIMON. If you could conclude your statement now.

Ms. KING. All right. To conclude my statement, Mr. Chairman, I have two letters from employees at the Equal Employment Opportunity Commission expressing their support for Judge Thomas. One is from a group of women and one is from the EEOC employees at headquarters in general. I would like to make these two letters a part of the record.

Senator SIMON. They will be included in the record.

Ms. KING. Thank you very, very much.

[The aforementioned was not available at press time.]

Senator SIMON. Commissioner Clyburn.

#### STATEMENT OF JAMES CLYBURN

Mr. CLYBURN. Thank you, Mr. Chairman.

It is a pleasure for me to be here today to present testimony in favor of my good friend, Clarence Thomas. I have known Clarence for 10 years, and I consider him to be a personal and professional friend, in spite of the fact that he shares a conservative Republican philosophy and I am considered a more moderate to liberal Democrat. We have argued and debated many topics during our relationship. On some occasions we have agreed and at other times we have disagreed. But through it all, I have always found him to be zealous in his pursuit of the facts and intellectually honest and objective.

Today I will make observations based on my 17 years of experience as commissioner of the South Carolina Human Affairs Commission, and two of those years I spent as president of the International Association of Human Rights Agencies and 1 year as president of our national association. Today I represent over 200 civil and human rights agencies as their congressional and Federal liaison.

In the interest of time, I am going to limit my observations to two areas because you have heard about two or three others already.

As South Carolina Human Affairs commissioner, I can appreciate the difficulty in assessing the performance of an agency which enforces anti-discrimination statutes. There is judgment involved every step along the way, and emotional disagreements are a regular part of the decision-making process.

But if there is one unassailable impediment to fair treatment under the law, it is inefficient and non-professional conduct by the enforcing agency. Judge Thomas brought efficiency and professionalism to this process in many ways, including reduction in processing time of appeals, higher standards of professionalism among staff members, greater accountability in its financial management, and a greater delegation of authority to State and local contracting agencies.

I do not find Judge Thomas, as many seem to feel, to be anti-affirmative action. He does express displeasure with any forms of racial preference and appears to believe that it is a dilution of affirmative action to award benefits those who have not been identified as victims. I am among those who differ with Clarence on this methodology. But it should be noted that this same Clarence Thomas, while at the EEOC, required us at the State and local levels to complete affirmative action plans as a prerequisite to obtaining contracts with EEOC.

In another instance, I think it is important to note that the people who know Clarence Thomas best, aside maybe from the people who are at this table from EEOC, are those of us who run the State and local agencies throughout the country.

We found Clarence to be highly compassionate, sensitive, judicious, and we always found him to be of the intellectual honesty that is required in this field.

Mr. Chairman, I do not present myself as one who has agreed with Clarence on every occasion. Trying to find consensus in enforcing anti-discrimination laws is about like trying to match up the sides of a Rubik's cube. While there have been instances where my philosophy may have differed from his, I have never found anything in his philosophy of a nature to deny him this Supreme Court confirmation.

When I look at the record of Clarence Thomas, I find the record of a man deeply committed to an even-handed system of justice. I would suggest that in Clarence Thomas there is the integrity, the conscientious spirit, and the basic sense of fairness which well describe the requirements for a successful Justice on the Supreme Court.

Thank you.

Senator SIMON. Thank you, Commissioner.

Dr. Shaw, as you may be aware, I have been very much involved in the historically black colleges portion of the Higher Education Act. Much of that was written with the great leadership of Dr. Patterson in my office when I was over on the House side.

As I follow the legal theories of Judge Thomas, he would say we can assist people on the basis of economic need. And in fairness to him, he has not suggested this, but as I follow the theories logically—and the commissioner referred to the racial preference issue that he believes is unconstitutional and unsound—he would rule that we could not have the kind of legislation that we now have for the historically black colleges and universities.

If you knew on the Supreme Court he was going to rule against funding for historically black colleges and universities, would you still be supporting him?

MR. SHAW. If I knew—let me, Senator Simon, say that a certain settlement that he made with General Motors some years ago, a large settlement, he deliberately saw to it that \$10 million of that went to historically black colleges. And I might say to you, sir, that initially I was opposed to Judge Thomas until I heard his posture with reference to historically black colleges. He believes they ought to be retained and strengthened.

If that documented decision of him is to presage his behavior on the Court—

Senator SIMON. If I may interrupt, are you saying—and maybe he has said this. I am not suggesting that he is opposed to the historically black colleges. What I am suggesting is that his legal theory, if it is followed, would suggest that Federal assistance on the basis of race would be unconstitutional. Are you saying that he has said that he follows a legal theory that that can continue?

MR. SHAW. I do not know that he is against opportunity for all Americans. And although I am not conversant to the fact regarding a legal theory of his which if extended would eliminate black colleges, I think I understand him. His position on civil rights would in fact support institutions that would give opportunities to all Americans, Senator. He is for civil rights. He is for opportunity. This has, in fact, made him what he is.

If any person would overturn the instruments that are made to enforce the American dream, I would be against him or her getting on the Supreme Court. But I do not see any necessary implication in his legal theory that would, in fact, eliminate black colleges.

Senator SIMON. All right. Well, we are both arguing theories at this point, and I did not ask Judge Thomas that. Thank you.

Senator THURMOND.

Senator THURMOND. Thank you very much, Mr. Chairman.

I want to take this opportunity to welcome this panel here. Dr. Shaw, you are from Raleigh, NC, I believe. Was Shaw University named after you?

MR. SHAW. No, sir. I don't own the place, sir. It is 126 years old this year. [Laughter.]

It is one of the accidents of history, sir.

Senator THURMOND. Ms. Talkin, I understand you and Ms. King have worked with Clarence Thomas and know him personally well.

MS. TALKIN. Yes, Senator.

Senator THURMOND. You are basing your testimony on your personal knowledge.

Ms. TALKIN. Yes, Senator.

Senator THURMOND. And, Dr. Shaw, you are basing your testimony on personal knowledge or writings of Clarence Thomas or what?

Mr. SHAW. His writings which I have read and from what I have heard. I do not know him personally, but I am basing my—

Senator THURMOND. His writings and reputation; is that it?

Mr. SHAW. Yes, sir.

Senator THURMOND. Mr. Clyburn, are you basing your recommendation on personal acquaintance, aren't you?

Mr. CLYBURN. Yes, sir.

Senator THURMOND. Personal knowledge as well as writings and other things, too?

Mr. CLYBURN. Yes, sir.

Senator THURMOND. Well, I want to thank you all for coming. I am not going to take a lot of time. I think we have taken too much time of some of these witnesses. It boils down to this: The same two questions I have asked these others witnesses I am going to ask you. And, Mr. Clyburn, I want to especially welcome you here.

Mr. CLYBURN. Thank you.

Senator THURMOND. You are the South Carolina Human Affairs commissioner in South Carolina.

Mr. CLYBURN. Right.

Senator THURMOND. We are very proud of your work. You have done a fine job there.

Mr. CLYBURN. Thank you very much.

Senator THURMOND. These are the questions I am going to ask all of you. We will start here with Dr. Shaw.

Is it your opinion that Judge Thomas is highly qualified and possesses the necessary integrity, professional competence, and judicial temperament to be an Associate Justice of the U.S. Supreme Court?

Mr. SHAW. Yes, sir. May I just read a last paragraph of my statement which is four lines in response to you?

Therefore, distinguished members of the Judiciary Committee, on such grounds as academic credentials, experience, symbolic significance, and intellectual honesty, I strongly recommend the confirmation of Judge Clarence Thomas for the U.S. Supreme Court.

So, yes, sir.

Senator THURMOND. So, your answer is yes?

Mr. SHAW. Yes.

Senator THURMOND. Ms. Talkin, I would ask you the same question.

Ms. TALKIN. I don't presume to substitute my judgment for this panel, but I would concur that he is well qualified.

Senator THURMOND. So, your answer is yes?

Ms. TALKIN. It is.

Senator THURMOND. Ms. King?

Ms. KING. Yes.

Senator THURMOND. The answer is yes. Mr. Clyburn?

Mr. CLYBURN. Yes.

Senator THURMOND. The second question: Do you know of any reason why Clarence Thomas should not be made a member of the U.S. Supreme Court, since he has been appointed by the President?

Mr. SHAW. No, sir, I don't.

Senator THURMOND. The answer is no. Ms. Talkin?

Ms. TALKIN. No, Senator.

Senator THURMOND. Ms. King?

Ms. KING. No.

Senator THURMOND. Mr. Clyburn?

Mr. CLYBURN. No, sir.

Senator THURMOND. I think you have answered the questions that the committee wants to know. We have spent days here probing affirmative action, but it all boils down to this, whether you favor him or not, and you said you do support him and you have told us why, so that is all we need to know.

Thank you very much. We are pleased to have you here.

Mr. CLYBURN. Thank you.

Senator THURMOND. Thank you, Mr. Chairman.

Senator SIMON. Senator Grassley?

Senator GRASSLEY. Thank you very much for your testimony, and I won't take a lot of time, just a very general question.

Because you know and have studied Clarence Thomas well, and particularly those who have worked closely with him, and because so often other panels have questioned his commitment to civil rights and equal opportunity, I want to ask each of you in much the same way that Senator Thurmond did, for a short opinion or statement:

Due to your extensive exposure to Clarence Thomas, do you have any question at all of his commitment to equal opportunity and civil rights, and not only in regard to African-American civil rights, but do you have any question that he is committed to the advancement of the civil rights of all minorities, whether it be African-Americans, women, the elderly, Hispanics, Asians, or any other group?

Dr. Shaw first, and then Ms. Talkin.

Mr. SHAW. I did not get the essence of your question, sir.

Senator GRASSLEY. Do you have any doubt in your mind—

Mr. SHAW. I don't.

Senator GRASSLEY [continuing]. About his commitment to civil rights?

Mr. SHAW. I don't.

Senator GRASSLEY. Ms. Talkin?

Ms. TALKIN. In my experience, Judge Thomas has demonstrated an unwavering dedication to civil right.

Senator GRASSLEY. And for all groups?

Ms. TALKIN. For all groups, and I can give you numerous examples, if you want.

Senator GRASSLEY. Ms. King?

Ms. KING. Based on my 30 years of work in the civil rights movement and the work with Judge Thomas, I am positively convinced that he does not have any problems in the area that you just outlined of civil rights.

Senator GRASSLEY. Mr. Clyburn?

Mr. CLYBURN. No, Senator, I do not. I think it is kind of interesting, if I may, that questions raised about the sole issue of affirmative action, every debate I have ever had with Clarence Thomas on this subject has always convinced me that he believes in affirmative action as a concept, very strongly. He has real problems with methodology, and there is difference of opinion as to what the methods ought to be.

Our of fairness to him, I think we ought to take into account, Senator Simon, that what Clarence has said time and time again is that race ought to be but one factor, that's the threshold that ought to be crossed, and after that threshold is crossed, then he thinks other things ought to kick in, in order to determine whether or not affirmative action ought to take place. So, I think that is a little bit different from what people seem to say as being against affirmative action.

Senator GRASSLEY. Senator Simon, I am through.

Senator SIMON. We thank the witnesses very much for being here. We appreciate you taking the time and also your patience in sitting through a lot of the hearings here.

Senator Biden wants to be here for the next panel, but we would ask Mr. Buchanan, Mr. Chambers, Mr. Rauh and Ms. Hernandez, if all four of you could come to the podium. Mr. Lucy is also on this next panel.

Senator Biden is on his way over here, and we will just take a 2-minute recess until he gets here.

[Recess.]

The CHAIRMAN [presiding]. The meeting will come to order.

Our seventh panel this morning, talk about optimism—when the staff wrote this, they said the seventh panel this morning—the seventh panel is one of our most distinguished panels that has come to testify in opposition to Judge Thomas, and includes John Buchanan, a former Congressperson, now the Policy Chair of People for the American Way. John, you have not only been here today, I have observed you have been here I think every day from the outset.

Julius Chambers, on behalf of the NAACP Legal Defense and Education Fund. I read your statement, Mr. Chambers, and you sure did a whole heck of a lot of work on going back and going through all of the former Justices, when they were appointed and how old they were, and I am anxious to hear what you have to say.

A man who is not at all unfamiliar to this committee, one of the distinguished lawyers in the Nation, Joseph L. Rauh, Jr. Joe is known to everyone on this committee and has been here on almost every important issue in the last couple of years.

Antonia Hernandez, on behalf of the Mexican-American Legal Defense and Education Fund and the Alliance for Justice.

And Mr. William Lucy, president of the Coalition of the Black Trade Unionists, and secretary-treasurer for the American Federation of State and County Municipal Employees. It is good to see you, Bill.

Again, I was told by Senator Thurmond that, in my absence, Senator Simon ran a tough ship. He said he got it done, he said he got everybody in in 5 minutes and limited Senators' questions. See even the stenographer smiling over there. So that there is not a re-

bellion on the committee, and I am not suggesting you should value my chairmanship, it would be helpful to me that you not make me look bad, in light of Simon's chairing of this committee.

All kidding aside, your entire statements will be placed in the record. We have a number of questions for you, so to the extent you can come close to keeping the limit, I would appreciate it.

Has the panel determined how they would like to proceed? Congressman, why don't you begin first, and we will work our way across, that is how we will do it.

**STATEMENT OF A PANEL CONSISTING OF JOHN H. BUCHANAN, JR., POLICY CHAIR, PEOPLE FOR THE AMERICAN WAY; JULIUS CHAMBERS, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; JOSEPH L. RAUH, JR., LEADERSHIP CONFERENCE ON CIVIL RIGHTS; ANTONIA HERNANDEZ, ON BEHALF OF THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND THE ALLIANCE FOR JUSTICE; AND WILLIAM LUCY, COALITION OF BLACK TRADE UNIONISTS**

Mr. BUCHANAN. Thank you, Mr. Chairman.

First, People for the American Way Action Fund has additional material we would like to submit for the record.

The CHAIRMAN. Without objection, it will be placed in the record.

Mr. BUCHANAN. Mr. Chairman and Senator Thurmond, it is neither easy or pleasant to come before this committee to testify against the nomination of Clarence Thomas. We do not take this step lightly. In fact, the People for the American Way Action Fund has only once before opposed a Supreme Court nominee.

Like Judge Thomas, I grew up in the Deep South in the bad old days of segregation, discrimination and white supremacy. My profound empathy and identification with black Americans is the reason I became a civil rights activist, as a Representative of Birmingham, AL, in the U.S. Congress. For 16 years, I served as a Representative to many families like Judge Thomas' and have served and do serve as a pastor to black Americans. I am keenly aware of the experience he shares with generations of African-Americans, and I understand the burden they have carried and the road they have traveled.

But in evaluating this nomination to the Supreme Court, the committee knows it must look beyond background and character, for character alone does not tell us what type of a Justice Clarence Thomas would make. Indeed, Mr. Chairman, I would submit that character is a threshold requirement for such a nomination, something that should be a granted and a given. We agree that it is vital to examine Clarence Thomas' record as a public official. That is what the People for the American Way Action Fund did, after Judge Thomas was nominated—reading every speech he made available and every article he had authored, and examining his service at the Office of Civil Rights and the EEOC.

After that searching and thorough process, we concluded that Judge Thomas' record reveals hostility to numerous Supreme Court precedents involving individual liberties and civil rights. In short, Mr. Chairman, Judge Thomas' troubled tenure in the executive branch, his obvious animosity toward Congress, and his oft-ex-

pressed, strongly held views on the vital constitutional issues that will come before the Court suggest that he would join forces with those Justices who would substitute their own judgments for the written law and who willingly disregard legislative directives.

I wish I could say his testimony before this committee had convinced us we were wrong. But nothing in Judge Thomas' 5 days of testimony led us to believe that we had made a mistake. In fact, the testimony only added to our concerns.

As a former Member of Congress, I know that one who aspires to high public office cannot simply disavow his or her prior actions and prior statements. Yet, that is precisely what Judge Thomas did for 5 days. He offered one excuse and evasion after another:

He had not read the document or he did not agree with statements he explicitly endorsed; or he did not mean what he said, it was only rhetoric designed to appeal to his audience; or he had no opinion on, indeed he had never thought about or discussed it; or he was only acting as an advocate for the administration and he would leave what he said in speech after speech in that capacity at the door of his chambers.

Sometimes, Judge Thomas asked the committee to ignore the plain meaning of his statements and writings, especially in the area of natural law. In other instances, Judge Thomas simply stonewalled on matters of great importance to the committee and the country, most notably a woman's right to choose.

Simply stated, Judge Thomas refused to engage in a dialog about his past record or even his view of the Constitution.

It is the Senate's constitutional responsibility to exercise meaningful advice and consent, a role coequal to that of the President. We agree with Senator Thurmond's statement in 1968 at another Supreme Court nomination hearing, when he said: "To contend that we must merely satisfy ourselves that the nominee is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view that neither the Constitution itself nor history and precedent have prescribed."

Judge Thomas' disavowals, equivocations, denials and stonewalling are no doubt part of a strategy to advance the nominee's chances for confirmation.

It is not just the liberals who have been concerned about this. One conservative activist said she wished he would be more specific and not try to ride the fence on these issues. Another said it is irritating that the White House strategists apparently feel he has got to go to such lengths to deny that he has a position comparable to the one that the President openly defended during his campaign.

Mr. Chairman, you mentioned the Souter standard might now become the Thomas standard. I would suggest it is the Bush standard, because the real question here is how far the White House will go in seeking to derail the Senate's constitutional obligation of advice and consent.

Whether the committee votes to put a liberal or a moderate or a conservative on the Court, at the very least you should be able to determine which it is you are getting. You should not have to take it on faith alone.

The question the members of this committee must ask is: Am I confident this nominee will protect American's fundamental liber-

ties. That question could not be answered in the affirmative before Judge Thomas' testimony. I would say we have heard in these hearings nothing that would overcome the worrisome aspects of his public record, and I think those questions remain.

It is our deepest hope, therefore, Mr. Chairman, the Senate will not approve this nomination and the erosion of the Court's historic role in protecting individual rights and liberties that it represents.

Thank you.

[The material referred to follows:]



**PEOPLE FOR  
THE AMERICAN WAY  
ACTION FUND**

*Defending Constitutional Liberties*

**CLARENCE THOMAS: THEN AND NOW**

In his first three days of testimony before the Senate Judiciary Committee this week, Judge Clarence Thomas repeatedly contradicted his previous record. Much of the discussion of those contradictions has focused on his testimony concerning Natural Law and its role in constitutional adjudication. Those contradictions are extremely significant, but the nominee has also contradicted himself on a variety of other issues.

The following quotations contrast Clarence Thomas's sworn testimony to the Senate Judiciary Committee with his previous record.

**Natural Law and Its Use in Constitutional Adjudication**

**Then** -- Clarence Thomas repeatedly advocated a "jurisprudence" grounded in "the Founders' notions of natural rights." (Notes on Original Intent) He argued that "without recourse to higher law, we abandon our best defense of judicial review" and that "higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges." ("The Higher Law Background of the Privileges and Immunities Clause," (hereinafter "Higher Law") *Harvard Journal of Law and Public Policy*, vol.12, no. 1, Winter 1989 at 63-64).

**Now** -- Clarence Thomas claims that "I don't see a role for the use of natural law in constitutional adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory." (Hearings before the Senate Judiciary Committee on Clarence Thomas to become an Associate Justice of the Supreme Court (hereinafter "Hearings"), Sep. 10, 1991 at 137). Later, in the hearings Thomas offered a somewhat different view, stating that "there is no independent appeal to Natural Law," but "what one does is one appeals to the Drafters' view of what they were doing, and they believe in Natural Law." (Hearings, September 12 at 41.)

**Opinion Concerning Roe v. Wade**

**Then** -- In a critique of so-called judicial activism, Clarence Thomas wrote that the "current case provoking the most protest from conservatives is Roe v. Wade." (Higher Law at 63 n. 2.) Thomas wrote in a black newspaper that there was "tremendous overlap of the conservative Republican agenda and Black beliefs on abortion" and other issues. ("How Republicans Can Win Blacks, Chicago Defender, Feb. 21, 1987)

Now -- Clarence Thomas told the Committee that "I cannot remember personally engaging" in any discussion about Roe v. Wade and "I do not" have a "personal opinion on the outcome in Roe v. Wade." (Hearings, Sep. 11, 1991 at 104-05)

#### White House Working Group on the Family

Then -- Clarence Thomas was the highest Administration official who served on the White House Working Group on the Family, which issued a report sharply criticizing as "fatally flawed" a series of decisions protecting the right to privacy, including Roe v. Wade. The Report notes that such decisions could be "corrected" either by constitutional amendment or by "the appointment of new judges and their confirmation by the Senate." (White House Working Group on the Family Report to the President, December 2, 1986 at 12)

Now -- Clarence Thomas claimed that "To this day, I have not read that report" and that he does not necessarily agree with several of its criticisms of privacy decisions (Hearings, Sep. 10, 1991 at 155,156-7).

#### Endorsement of Lewis Lehrman's Anti-abortion Article

Then -- Clarence Thomas called Lewis Lehrman's article, entitled "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," a "splendid example of applying natural law to the right to life." (Speech before the Heritage Foundation, June 18, 1987 at 22)

Now -- Clarence Thomas says that he "did not endorse the article," does not agree with it, and was attempting to use it simply to "convince my audience" concerning his views of civil rights. He testified that "I do not believe that Mr. Lehrman's application of natural law is appropriate." (Hearings, Sep. 10, 1991 at 195-7; Hearings, Sep. 11, 1991 at 97)

#### Views on the Ninth Amendment

Then -- Clarence Thomas criticized the "invention" and "activist judicial use of the Ninth Amendment," and wrote that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom." ("Civil Rights as Principle versus Civil Rights as Interest," in D. Boaz, ed., Assessing the Reagan Years, Spring 1987 at 398-9; "Higher Law" at 63 n.2)

Now -- Clarence Thomas testified that "I think that the only concern I have expressed with the respect to the Ninth Amendment, Senator, has been a generic

one" that a judge "who is adjudicating under those open-ended provisions tether his or her rulings to something other than his or her personal point of view." (Hearings, Sep. 11, 1991 at 110)

### Participation in Lincoln Review

**Then** -- Clarence Thomas served for ten years on the Editorial Advisory Board of the Far Right Lincoln Review and published three articles in the journal. It was the only scholarly publication with which Thomas was affiliated. (The three articles were "With Liberty...For All," Lincoln Review, Winter - Spring 1982 at 41; "Remembering an Island of Hope in an Era of Despair," Lincoln Review, Spring 1986 at 53; "Thomas Sowell and the Heritage of Lincoln," Lincoln Review, Winter 1987/88 at 7.)

**Now** -- Clarence Thomas said, "the role of a member of the advisory board was purely honorary. There were no meetings. There was no review of literature. There were no communications. There was no selection of material that was included in the journal. Indeed, I don't think that I have read a copy of the Lincoln Review in two or three years." (Hearings, Sep. 11, 1991 at 175)

### Jay Parker and South Africa

**Then** -- At an EEOC staff meeting in 1986, Clarence Thomas discussed for 45 minutes the representation of South Africa by his friend Jay Parker, according to former Thomas aides. (Newsday, Sep. 12, 1991) In 1987, according to Foreign Agents Registration Act records, Thomas attended a dinner for the South African ambassador which Parker helped to arrange. (IPAC filings under the Foreign Agent Registration Act, Sep. 10, 1987; Newsday July 16, 1991).

**Now** -- Thomas testified that "I was not aware, again, of the representation of South Africa itself" by Jay Parker. (Hearings, Sep. 11, 1991 at 174)

### Level of Protection for Economic Rights

**Then** -- Clarence Thomas argued, "What we need to emphasize is that the entire Constitution is a Bill of Rights; and economic rights are protected as much as any other rights." (Speech to the American Bar Association, Aug. 11, 1987 at 10)

**Now** -- Clarence Thomas claimed, "There is also a reference to property in our Constitution. That does **not** necessarily mean that in constitutional adjudication that the protection would be at the same level that we protect other rights. Nor

did I suggest that in constitutional adjudication that would happen. But it certainly does deserve some protection." (Hearings, Sep. 10, 1991 at 144)

#### Views on Discrimination against Women in the Work Place

Then -- Clarence Thomas argued that "the disparity in hiring figures between men and women" in cases like the Sears case could "be due to cultural differences between men and women, educational levels, commuting patterns, and other previous events." (Juan Williams, "A Question of Fairness," Atlantic Monthly, February 1987 at 81, quoting Williams.) Thomas praised an article by Thomas Sowell, that argued that historic pay and job inequities between men and women were due largely to women's personal choices, as a "useful, concise discussion" which "presents a much-needed antidote to cliches about women's earnings and professional status." ("Thomas Sowell and the Heritage of Lincoln," Lincoln Review, Winter 1987/88 at 15-16)

Now -- Clarence Thomas maintains that "I did not indicate that, first of all, I agreed with [Sowell's] conclusions" and that "my only point in discussing statistics is that I don't think any of us can say that we have all the answers as to why there are statistical disparities." (Hearings, Sep. 10, 1991 at 189,193)

#### Violations of Age Discrimination Law

Then -- Thomas stated that "I am of the opinion that there are many technical violations of the Age Discrimination in Employment Act that, for practical and economic reasons, make sense. Older workers cost employers more than younger workers. Employee benefits are linked to longevity and salary." (ABA Banking Journal 9/85 at 120)

Now -- Clarence Thomas claimed that "I have never condoned violations of the Age Discrimination in Employment Act," although "it would make sense to an employer to think that, well, this approach is okay." (9/12 at 110,112).

#### Violation of Court Order while at Office of Civil Rights

Then -- While head of the Office for Civil Rights at the Department of Education, Thomas admitted in federal court that he was violating "grievously" a court order concerning OCR handling of civil rights cases. The court concluded that "the order has been violated in many important respects and we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court." (Adams v. Bell, 3/12/82 Tr. at 61 &

3/15/82 Findings at 3)

Now -- Clarence Thomas testified that "we did everything we could to comply" with the court order and that the court recognized that "we were doing all we could" and "that it was impossible for us to comply with it." (9/12 at 161)

### Run-amok Judges

**Then** -- Clarence Thomas wrote that "higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges." ("The Higher Law Background of the Privileges and Immunities Clause," Harvard Journal of Law and Public Policy, vol. 12, no. 1, Winter 1989 at 63-64)

**Now** -- In response to Senator Kennedy's question of whether the nominee could identify any run-amok judges, Thomas said: "Senator, I thought about it when I looked at that language again, and I couldn't name any particular judge." (Sept. 13 P. 145)

### Views on Oliver Wendell Holmes

**Then** -- Clarence Thomas stated that "If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes." Quoting Walter Berns, a leading natural law advocate, and Robert Faulkner, Thomas said of Holmes: "No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach . . . what a people needs to govern itself well," and "what [John] Marshall had raised Holmes sought to destroy." Speech to Pacific Research Institute, August 4, 1988 p.13.

**Now** -- Clarence Thomas characterized Holmes as "a great judge." He stated that "we might disagree here and there" but that "he is a giant in our judicial system." September 13 P. 145.

### The Nomination of Robert Bork

**Then** -- Clarence Thomas stated that "Judge Bork is no extremist of any kind. If anything, he is an extreme moderate." (Speech to Pacific Research Institute Aug. 10, 1987 p. 16). According to Thomas, it "reflected disgracefully on the whole nomination process that Judge Bork is not now Justice Bork." (Speech to Cato Institute Oct. 2, 1987 p. 2) Thomas referred to the "spectacle of Senator Biden, following the defeat of the Bork nomination, crowing about his belief that his rights were inalienable and came from God." (Speech to Pacific Research

Institute Aug. 4, 1988 p.12)

Now -- Clarence Thomas testified that "I do not think that this committee and did not say that this committee engaged in" improper characterizations or conduct with respect to the Bork nomination, but "my view was that Judge Bork was qualified as to his temperament, as to his competence, and certainly qualified as to his overall abilities." (Sept. 13 P. 103,104)

#### Statements about Oliver North and Congress

Then -- Clarence Thomas stated that "I thought that Ollie North did a most effective job of exposing Congressional irresponsibility. He forced their hand, and revealed the extent to which their public persona is a fake." (Speech at Wake Forest, April 18, 1988 p.21). He commented "As Ollie North made perfectly clear last summer, it is Congress that is out of control." (Speech at Univ. of Virginia March 5, 1988 p.13) (emphasis in original) According to Thomas, North's testimony showed that the defense of limited government "is still possible," and the Iran-Contra committee "beat an ignominious retreat before Colonel North's attack on it, and by extension all of Congress." (Speech to Cato Institute, Oct. 2, 1987 p.13)

Now -- Clarence Thomas testified that "I do not think that I condoned" improper conduct by North. "I think myself, like many others, that in that highly charged political environment that Col. North took the advantage to himself and used that environment to his advantage, rather than succumbing to it." (Sept. 13 P.92)

#### Obligations of government and compassion

Then -- Clarence Thomas stated that "I, for one, don't see how the government can be compassionate. Only people can be compassionate and then only with their own money, their own property and their own efforts, not that of others." (Speech at California State Univ. April 25, 1988 p.22) He advocated changes "affecting our governance in all areas," including not only "racial preference schemes, and welfare and housing policy, but so-called middle class welfare programs as well", under which government "would return to limited government." (Speech at Wake Forest Univ. April 18, 1988 at 25-6)

Now -- Clarence Thomas testified that government "has an obligation" and "as a community, as people who live in an organized society, we have an obligation as a people to make sure that other people are not left out." (Sept. 13 P.86)



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## INTRODUCTION

In recent years, Supreme Court decisions narrowly interpreting congressional legislation and legislative authority have posed increasing problems for Congress and the nation. A series of Court decisions according a cramped construction to federal civil rights laws has led to divisive and difficult battles over legislation to correct the Court rulings.<sup>1</sup> This year in Rust v. Sullivan,<sup>2</sup> the Court deferred to a controversial agency interpretation of a federal family planning law imposing an abortion "gag rule." The decision produced outcries in Congress and both houses have approved legislation to prevent its implementation, which President Bush has threatened to veto.<sup>3</sup> Recently, the Court upheld by only a narrow 5-4 vote the authority of Congress to pass remedial legislation to counteract prior discrimination.<sup>4</sup> As a result, the views of any Court nominee concerning Congress and congressional authority are critical for the Senate to examine.

Article I of the U.S. Constitution established Congress as the legislative branch of government vested with appropriate powers. Among its mandates is the authority to make all laws necessary for the functioning of government.<sup>5</sup> To carry out its constitutional duty, Congress must be able to monitor the effectiveness of congressionally created entities.

The record reveals, however, that one of the central concerns about Clarence

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<sup>1</sup> See H.R.1 (1991) (Civil Rights Act of 1991).

<sup>2</sup> 111 S.Ct. 1759 (1991).

<sup>3</sup> See S.323, H.R.392 (1991).

<sup>4</sup> See Metro Broadcasting v. FCC, 110 S.Ct. 2997 (1990).

<sup>5</sup> Art. 1, sec. 8, cl. 18. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoin Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thomas is his attitude toward Congress and its authority. Throughout his professional career, Thomas has avoided accountability to congressional committees; he has been uncooperative and hostile when forced to confront Congress' necessary oversight responsibilities; and he has disparaged Congress' authority and praised those who disregard that authority. Before Thomas was nominated to the U.S. Court of Appeals for the D.C. Circuit, 14 members of the House of Representatives took the extraordinary step of writing to President Bush urging him not to nominate Thomas precisely because of his "overall disdain for the rule of law."<sup>6</sup> All of the members who signed the letter either chaired or were senior members of congressional committees with responsibility for oversight of the EEOC.<sup>7</sup>

A brief review of Thomas' quotes about Congress, all of which are examined in further detail in this report, is revealing. According to Thomas:

- Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws."
- "Congress is no longer primarily a deliberative or even a law-making body."
- As EEOC chair, he was "defiant in the face of some petty despots in Congress."
- The General Accounting Office is the "lapdog of Congress."
- "As Ollie North made perfectly clear last summer, it is Congress that is out of control."
- "Under the guise of exercising oversight functions," a

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<sup>6</sup> Letter from 14 members of the House of Representatives to President Bush, July 17, 1989.

<sup>7</sup> The signatories of the letter were: Don Edwards, Edward Roybal, Cardiss Collins, Charles Hayes, Barney Frank, Tom Lantos, Pat Williams, William Clay, Gerry Sikorski, Augustus Hawkins, Matthew Martinez, Dale Kildee, Patricia Schroeder and John Conyers.

congressional staffer "seeks to implement the program of the American Association of Retired Persons."

- o "Democratic Subcommittee and Committee Chairmen micromanage agencies and departments."
- o "An oversight request for semi-annual reports on the EEOC's work was an "intrusion into the deliberations of an administrative agency."
- o "Ollie North did a most effective job of exposing congressional irresponsibility" and "revealed the extent to which their public persona is a fake."
- o "A Supreme Court decision by Chief Justice Rehnquist upholding Congress' authority to appoint special prosecutors "failed not only conservatives but all Americans."
- o "There is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."

Thomas' consistent contempt for Congress, its processes, its mandates and its constitutional role indicates an impatience with democratic ideals ill-suited to a nominee for the U.S. Supreme Court. His past actions and statements indicate that if Thomas is confirmed for the Supreme Court, he is likely to heighten the conflict between the Court and Congress and contribute to undermining legislative authority.

### **A CASE STUDY: CLARENCE THOMAS AND CONGRESSIONAL OVERSIGHT OF "LAPSED CASES" BY EEOC**

An egregious example of Clarence Thomas' resistance to legislative oversight came during a congressional inquiry into EEOC enforcement of the Age Discrimination in Employment Act (ADEA). Thomas' hostile and uncooperative behavior during a

legitimate congressional inquiry raises serious questions about his fitness for a seat on the nation's highest court.

The EEOC is responsible for implementation of the ADEA and ensuring that seniors are not discriminated against in matters of employment. After a person who thinks he or she has been the victim of age discrimination files a claim with EEOC, there is a two-year statute of limitations within which EEOC must act or the claim will lapse. In 1988, in response to concerns raised by seniors and other, the Senate Special Committee on Aging investigated EEOC's enforcement of the ADEA.

According to a finding by the Committee on Aging, "The EEOC misled the Congress and the public on the extent to which ADEA charges had been permitted to exceed the statute of limitations."<sup>8</sup> The Committee report provides a revealing comparison of what then-Chairman Thomas knew and what he stated to the Committee at a public hearing.

Acting on reports that large numbers of cases were exceeding the statute of limitations, the Committee on Aging requested figures on the number of lapsed cases from EEOC on September 3, 1987. EEOC conducted a telephone survey of regional offices and learned that before the end of the month over 1,500 cases would exceed the statute of limitations. At the hearing, Thomas elected to reduce that figure by 95 percent and reported that only 70 cases had lapsed.<sup>9</sup>

In response to a request for further data by the Senate Committee Thomas

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<sup>8</sup> Unpublished report of the Senate Special Committee on Aging, 100th Cong., 2d Sess., 1988, p. 36.

<sup>9</sup> *Id.* at 37.

balked, saying "we do not routinely keep statistics in forms that are of no use to us."<sup>10</sup> He was completely oblivious to the need for others, specifically Congress, to be able to monitor EEOC's progress and effectiveness, and said nothing to Congress about the data already in EEOC's possession responsive to the Committee's requests.

Over the next three months the Committee continued its efforts to obtain information on lapsed cases from EEOC. Thomas refused, leading the Chair of the Committee to write an unusually harsh letter to EEOC: "Your unnecessary delay in supplying us with information is an unwarranted withholding of information from the Senate."<sup>11</sup> On December 23, 1987 EEOC reported a total of only 78 lapsed cases.

Only after news reports put the number at nearly 900, did Thomas acknowledge that approximately 900 cases had exceeded the statute of limitations. In the face of continuing reports of more lapsed cases, the Committee issued a subpoena demanding more exact information by March 11, 1988. EEOC responded to the subpoena by claiming that 779 ADEA charges had exceeded the statute of limitations between 1984 and 1987 with 350 of them lapsing in 1987. Two weeks later Thomas received an internal report that the actual figure was 1,200 for 1987 alone. But the ballooning number of lapsed charges did not end there.

To ensure that claimants would not necessarily lose their rights due to EEOC's neglect, Congress passed the Age Discrimination Claims Assistance Act of 1988, extending the statute of limitations for some lapsed cases. In November 1988, over one

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<sup>10</sup> *Id.* at 38.

<sup>11</sup> *Id.* at 39-40.

year after the Committee's original request, EEOC submitted a report mandated under the new law, which stated that as many as 8,800 cases may have exceeded the statute of limitations between 1984 and 1987 -- more than ten times the number that EEOC had reported under subpoena.<sup>12</sup> Eventually EEOC admitted mailing notices of expiration to more than 13,000 seniors whose claims had been allowed to lapse.<sup>13</sup>

Senator David Pryor, the current Chair of the Committee on Aging, summed up the results of Thomas' disregard of congressional authority.

I was dismayed to learn about several erroneous statements made by Chairman Thomas...These statements are certainly misleading, and raise serious questions about the nominee's appropriateness for the Federal bench.

[T]here should be little dispute that thousands of ADEA claimants have unfairly and unacceptably lost their rights during Chairman Thomas' 8-year tenure. We all agree that the massive lapses of ADEA charges prior to 1988 should have never happened. Likewise, we must recognize the tragedy and irony that even as Congress was acting to restore the rights of those who lose [sic] claims during that period, hundreds more cases were lapsing.<sup>14</sup>

Thomas nonetheless harshly criticized Congress' oversight efforts, particularly the Committee on Aging. "My agency will be virtually shut down by a willful Committee staffer who has succeeded in getting a Senate Committee to subpoena volumes of EEOC records...Thus, a single unelected individual can disrupt civil rights enforcement -- and all

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<sup>12</sup> *Id.* at 44.

<sup>13</sup> Cong. Rec. S1542 (daily ed. February 22, 1990) (statement of Sen. Pryor).

<sup>14</sup> *Id.* at S1542-43.

in the name of protecting rights."<sup>15</sup> In a later speech, he further derided the motives and integrity of the staff member. "Under the guise of exercising oversight functions, the staffer seeks to implement the program of the American Association of Retired Persons, AARP."<sup>16</sup> Thomas seems unconcerned that had it not been for the Senate Committee's diligent actions in determining the number of lapsed ADEA charges, no remedial legislation would have been enacted and thousands of claimants would have lost their rights forever due to his agency's neglect. It therefore seems odd that he would conclude that Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom."<sup>17</sup>

Thomas' open hostility to Congress' legitimate role shows a disturbing disregard for the system of constitutional checks and balances and for Congress' oversight authority.

### **THOMAS' SPEECHES AND PUBLIC STATEMENTS ON CONGRESS AND CONGRESSIONAL AUTHORITY**

Further instances of Thomas' disparaging references to Congress checker his writings and speeches. For example, in a speech on the role of Congress in the

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<sup>15</sup> Speech to The Federalist Society at the University of Virginia, March 5, 1988, p. 13. Similar statements were also made in other forums. See also speech to The Tocqueville Forum at Wake Forest University, April 18, 1988, p. 22.

<sup>16</sup> Prepared text for speech to The Federalist Society at Harvard University, April 7, 1988, p. 13, not delivered.

<sup>17</sup> Wake Forest University speech at 20.

formation of public policy, he said that "it may surprise some but Congress is no longer primarily a deliberative or even a law-making body...[T]here is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."<sup>18</sup>

The theme of this speech was that Congress has generally abdicated its responsibility to formulate readily understandable legislation, and that it instead enacts overly broad laws, the interpretation of which is left to the bureaucracy. Despite the view that Congress takes a hands-off approach Thomas nonetheless charges that "Democratic Subcommittee and Committee Chairmen micromanage agencies and departments."<sup>19</sup> Worse still, according to Thomas, is that such a process puts tremendous power in the hands of Subcommittee chairs, who "direct and administer bureaucracies in a manner compatible with their own interests."<sup>20</sup> This point of view is apparently responsible for his characterization of members of Congress as "petty despots."<sup>21</sup>

Clearly in Thomas' eyes Congress cannot win. If it passes a statute that is insufficiently detailed, it is because members "prefer to remain in the shadows on controversial issues."<sup>22</sup> But if Congress acts to check the improper implementation of a statute by an executive agency, it is engaging in "selective intervention" and creating a

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<sup>18</sup> Speech to the Gordon Public Policy Center, Brandeis University, April 8, 1988, p. 4.

<sup>19</sup> Speech to the Pacific Research Institute, August 4, 1988, p. 19.

<sup>20</sup> Brandeis University speech at 10.

<sup>21</sup> Harvard University speech at 13.

<sup>22</sup> Speech to the Palm Beach Chamber of Commerce, May 18, 1988, p. 24.

"feeble executive which means a weakened presidency."<sup>23</sup> This despite the allegedly overbroad grant of power to the executive branch.

The example of "selective intervention" Thomas used to demonstrate his thesis concerned an attempt at oversight by three members of the Senate Labor and Human Resources Committee, Senators Edward Kennedy, Howard Metzenbaum and Paul Simon. They asked Thomas at the time of his 1986 renomination as head of the EEOC to keep them apprised of the EEOC's work by submitting semi-annual reports "to be sure this committee is informed about EEOC progress in enforcing the law as Congress and the Supreme Court intend."<sup>24</sup> Thomas was harshly critical of this "intrusion into the deliberations of an administrative agency."<sup>25</sup>

Thomas even resents congressional "intrusion" into serious allegations of improper behavior at his agency. In 1989, a House Subcommittee looked into charges that an EEOC district director had been demoted for testifying before Congress under subpoena in such a way as to cast EEOC in a negative light. When asked about these harassment charges Thomas responded:

The one thing that I do want is for at least at some point the legislative branch to leave the agency alone so it can get its house in order and hopefully at some point miraculously give it the resources so it can get its house in order.

You want to talk about harassment, I can tell you about two years of harassment, and I can tell you about two years of not

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<sup>23</sup> Brandeis University speech at 4-5.

<sup>24</sup> Quoted in Brandeis University speech at 5.

<sup>25</sup> *Id.* at 6.

giving the agency the resources to do the incredible job that is being required.<sup>26</sup>

Besides trivializing the charges of retaliation against a whistleblower, Thomas' statement shows two things. First he views a congressional investigation as "harassment," and second he believes Congress should simply provide funds with no oversight into how the money is spent.

This was not merely an example of Thomas losing his temper under sharp questioning. He was repeating a sentiment that he had expressed earlier in his own speeches.

Through subcommittees and professional staff, the typical member of Congress is a kind of unseen co-administrator of a part of the executive branch bureaucracy. They are able to exercise this authority on a regular basis by subjecting administrators to the will, not of Congress, but that of the members who have jurisdiction over the agency.

They are able to do so through control of agency budgets, personnel, and reporting requirements, as well as through the power of investigation.<sup>27</sup>

Rather than viewing congressional control of the purse, the power to confirm appointments, and authority to investigate abuses as constitutional mandates, Thomas

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<sup>26</sup> EEOC's Reprisal against District Director for Testimony before Congress on Age Discrimination Charges before the Employment and Housing Subcommittee of the House Government Operations Committee, 101st Cong., 1st Sess., March 20, 1989, p. 99.

<sup>27</sup> Brandeis University speech at 12. See also Palm Beach speech at 24-25.

disparages such oversight as an inappropriate intrusion into executive autonomy.<sup>28</sup>

Thomas' complaints include the confirmation process for Supreme Court Justices. "It was a disgrace on the whole nomination process that Judge Bork is not now Mr. Justice Bork."<sup>29</sup> The Senate's rejection of Robert Bork was undoubtedly a disappointment to right-wing extremists, but it was certainly not a disgrace to the process.<sup>30</sup> Judge Bork testified for five days before the Judiciary Committee on a whole range of constitutional questions. In the end, the nation rejected a man who defended the constitutionality of the poll tax and who would not uphold the use of contraceptives by a married couple as a constitutionally protected right of privacy.<sup>31</sup>

Further evidence of Thomas' contempt for the legislative process and the rule of law can be found in his praise for Oliver North. In one speech, as support for the proposition that Congress is too involved in executive matters, Thomas stated, "I thought that Ollie North did a most effective job of exposing congressional irresponsibility. He

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<sup>28</sup> As recently as this year, Judge Thomas indicated that Congress' investigating body, the General Accounting Office, is not credible since it is the "lapdog of Congress." Speech at Creighton University School of Law, February 14, 1991, p. 6.

<sup>29</sup> Speech before the Cato Institute, October 2, 1987, p. 2. See also Harvard University speech at 11.

<sup>30</sup> Thomas' very use of the phrase "nominating process" seems to exclude any role for the Senate. The President nominates but then the Senate must exercise its constitutional responsibility to confirm or reject the nominee. The nominating process for Judge Bork was done in the White House; the confirmation process was carried out in view of the entire country.

<sup>31</sup> In other speeches Thomas attacked Senator Joseph Biden, whom he depicted as "crowing" over the defeat of Bork's nomination to the Supreme Court. Pacific Research Institute speech at 12. See also Harvard University speech at 12.

forced their hand, and revealed the extent to which their public persona is a fake.<sup>32</sup> In another speech, Thomas said that the congressional committee "beat an ignominious retreat before Colonel North's direct attack on it, and by extension all of Congress."<sup>33</sup> In other speeches, while decrying Congress' role in overseeing the federal bureaucracy, he noted that "as Ollie North made perfectly clear last summer, it is Congress that is out of control!"<sup>34</sup> This praise for North's open disregard of the intentions of Congress and its constitutional role as the law-making body is wholly inappropriate from one being considered for an appointment to the Supreme Court.

One indication of how Thomas would limit congressional power on the Supreme Court came in his comments on the case of Morrison v. Olson.<sup>35</sup> That case tested the authority of Congress to appoint a special prosecutor -- an issue of considerable importance to Oliver North. Although the Court ruled 7-1 in favor of Congress' authority, Thomas could only praise Justice Scalia's "remarkable" dissent. Calling the decision "the most important Court case since Brown v. Board of Education," Thomas placed himself to the ideological right of even Chief Justice Rehnquist in attempting to limit Congress' power. He stated that, "Unfortunately, conservative heroes such as the Chief Justice failed not only conservatives but all Americans" in Morrison.<sup>36</sup> Such

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<sup>32</sup> Wake Forest University speech at 21.

<sup>33</sup> Cato Institute speech at 13.

<sup>34</sup> University of Virginia speech at 13 (emphasis in original). See also Harvard University speech at 13.

<sup>35</sup> 487 U.S. \_\_\_\_; 108 S.Ct. 2597 (1988).

<sup>36</sup> Pacific Research Institute speech at 6-7.

attitudes by the Supreme Court nominee are of grave concern.

### **THE VERDICT OF CONGRESS AND THE COURTS ON THOMAS**

As members of Congress and the federal bench have reviewed Thomas and his performance at the EEOC, they have forcefully voiced their own concerns about Thomas' respect for Congress and the rule of law. In July 1989, 14 Representatives, many of them Committee and Subcommittee chairs with responsibility for overseeing EEOC, wrote an extraordinary letter to President Bush. They urged the President not to nominate Thomas to the U.S. Court of Appeals. "Mr. Thomas' actions as chair of the Equal Employment Opportunity Commission raise serious questions about his judgment, respect for the law and general suitability to serve as a member of the Federal judiciary."<sup>37</sup> Eight years of dealing with Thomas had shown the members that "Mr. Thomas has resisted congressional oversight and been less than candid with legislators about agency enforcement policies."<sup>38</sup> The letter concluded that "Mr. Thomas has demonstrated an overall disdain for the rule of law."<sup>39</sup>

The courts have also noticed Thomas' attitude toward Congress and the rule of law. When Thomas took over EEOC in 1982 he inherited an administrative interpretation of a regulation concerning pension contributions for workers over age 65. He acknowledged that the interpretation was incorrect and should be changed. After

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<sup>37</sup> Letter to President Bush.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

years of delay including repeated assurances to members of Congress that a change was imminent, a lawsuit was filed to force a change. The court held that the delay was inexcusable and ordered an immediate revision. "Although it is among the Commission's duties under law to eradicate age discrimination in the workplace and to protect older workers against discrimination, that agency has at best been slothful, at worst deceptive to the public, in the discharge of these responsibilities."<sup>40</sup> The court agreed that Thomas and his staff had misled Congress. "[T]he Commission has been no more candid with this Court than with the Senate committees and the public."<sup>41</sup>

## CONCLUSION

The need for Supreme Court Justices to respect the intent and authority of Congress is well established. Much of the Court's work involves interpretation of statutory language and congressional intent. In recent years, conservative Justices have undermined many statutes, most notably in the areas of civil rights and family planning legislation. These Court decisions have damaged privacy interests and civil rights protections, forcing Congress to take repetitive steps to overrule the Court that should not be necessary.

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<sup>40</sup> American Association of Retired Persons v. EEOC, 655 F. Supp. 228, 229 (D.D.C.), aff'd in part, rev'd in part on other grounds, 823 F.2d 600 (D.C. Cir. 1987).

<sup>41</sup> Id., at 238. In its decision, the court gave one example in which EEOC had literally told Senators one thing while doing another. Id., at 234, n.19. Even before Thomas joined EEOC, another federal judge found that while Thomas was head of the Office for Civil Rights at the Department of Education, a court order governing OCR had "been violated in many important respects." Adams v. Bell, No. 3095-70 (D.D.C. Mar. 15, 1982) at 3.

Instead of effectuating Congress' intent in passing statutes, Thomas has viewed any section that is open to interpretation as void and seizes the opportunity to make new law. The disdain that Thomas has displayed for Congress and its intentions strongly suggests that, if confirmed, he would further the current Court's disturbing trend of misreading legislation and limiting congressional authority.



**PEOPLE FOR  
THE AMERICAN WAY**

*Defending Constitutional Liberties*

**JUDGE CLARENCE THOMAS:**

***'An Overall Disdain  
for the Rule of Law'***

**July 30, 1991**

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**JUDGE CLARENCE THOMAS:  
'AN OVERALL DISDAIN FOR THE RULE OF LAW'<sup>1</sup>**

The nomination of Judge Clarence Thomas to the Supreme Court comes at a historic juncture when the rights and liberties of the American people are under siege. After weeks of research into Mr. Thomas' public record, the Board of Directors of the People For the American Way Action Fund has concluded that Judge Thomas is an unacceptable choice for the Supreme Court and urges the United States Senate to reject his nomination.

**INTRODUCTION**

The Supreme Court is the last bulwark of protection of the rights of every American citizen. Recently, the Supreme Court has charted a dramatic course that has changed the law in just a few years. Rights and protections that millions of Americans depend on are now threatened. Reproductive freedom has been restricted, and the basic right to choice on abortion is imperiled as new state laws make their way to the Supreme Court. Civil rights protections for women and minority workers have been undermined. The bright line separating church and state is gradually being weakened.

For all the setbacks to individual rights we have already witnessed, the potential future threats are even more severe. The Court has already accepted cases involving school desegregation and church-state questions for the next term. Looming just over the horizon are cases involving the restrictive abortion laws passed in the wake of the Court's decision in Webster v. Reproductive Health Services. As we enter a new century, the Court will grapple with complex new legal issues spawned by significant changes in technology, communications, medicine and a host of other fields.

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<sup>1</sup> Letter from 14 Members of Congress to President George Bush asking that the President not nominate Clarence Thomas to the United States Court of Appeals for the District of Columbia, July 17, 1989.

Even as the Court has reversed course, a thin line still exists among the Justices on many of these issues. The conservative judicial activists, led by Chief Justice Rehnquist and Justice Scalia, have been pushing for a wholesale rewriting of the law. Respect for prior decisions -- the principle of stare decisis -- has always been central to our constitutional system. But in its judicial activism the current Court seems determined to abandon this principle and replace it with an approach in which "power, not reason, is the new currency of [the] Court's decisionmaking."<sup>2</sup>

In his final dissent, Justice Thurgood Marshall inveighed against his fellow justices' reversal of precedent and their "far-reaching assault" on the Bill of Rights.<sup>3</sup> To date, a comparatively more moderate bloc on the Court has been able to restrain the activist impulse in a number of critical cases.

The next justice will play a pivotal role in determining the future direction of the Court. Not only will he or she participate in cases that will have a profound impact on the quality of life for millions of Americans, the new justice will also help to define whether the Court will pursue an even more activist agenda of reversing Supreme Court precedents that protect individual liberties and civil rights. It is in this context that we consider the nomination of Clarence Thomas to fill the seat being vacated by Justice Marshall.

In weighing this historic nomination, the People For the American Way Action Fund measured Judge Thomas' record against five essential standards that must be met by any nominee to our highest court. The standards are: demonstrated outstanding legal ability and competence as evidenced by substantial legal experience; proven respect for established legal precedents and commitment to core constitutional values; respect for the constitutional system of government and the separation of powers; a judicial philosophy that falls in the mainstream of legal thought; and an appreciation for the impact of the law and government actions on individuals. We base our final judgment on this broad range of criteria.

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<sup>2</sup> Payne v. Tennessee, 59 U.S.L.W. 4814, 4824 (1991) (Marshall, J., dissenting). Chief Justice Rehnquist reiterated his attack on stare decisis in a speech to the Fourth Circuit Judicial Conference. See Legal Times, July 15, 1991 at 9.

<sup>3</sup> Payne, 59 U.S.L.W. at 4824 (Marshall, J., dissenting).

After a thorough examination of Clarence Thomas' public record, we find that he fails to meet these essential standards for elevation to the Supreme Court. The reasons for our conclusion are:

- Mr. Thomas' legal and judicial experience are far too limited for a Supreme Court nominee. Mr. Thomas served for nine years -- more than half his professional career -- as an official in the Reagan and Bush administrations, and his performance in these positions was marred by proven allegations of lax enforcement and disrespect for the law. Mr. Thomas has served only 17 months on the appellate court, not long enough to amass a significant record.
- Mr. Thomas has repeatedly attacked key Supreme Court precedents. Mr. Thomas has severely criticized a dozen landmark Supreme Court rulings, focusing especially on cases involving fundamental individual liberties, remedies for workplace discrimination, and school segregation cases.
- Mr. Thomas has time and again failed to enforce the law. In his positions as Chair of the EEOC and as Director of the Office of Civil Rights in the Department of Education, Mr. Thomas has often disregarded Congressional mandates or court orders.
- Mr. Thomas has shown hostility to legislative authority. Mr. Thomas was extremely uncooperative with Congress, and in one instance a committee was forced to subpoena agency records he had refused to produce. In speeches and articles, Mr. Thomas publicly endorsed the flouting of Congressional authority and investigations.
- Mr. Thomas espouses a judicial philosophy based on natural law that is "outside the mainstream of constitutional interpretation."<sup>4</sup> Since 1987, Mr. Thomas has written and spoken extensively about natural law or higher law as being a necessary part of constitutional interpretation. The natural law theory that Mr. Thomas has embraced has been widely discredited, and Mr. Thomas' suggested applications of the theory could result in dramatic reversals of Supreme Court precedents.

For these reasons, we have concluded that Clarence Thomas' nomination to the Supreme Court must be opposed. This was not an easy conclusion to reach. The People For

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<sup>4</sup> Geoffrey Stone, dean of the University of Chicago Law School, quoted in Page, "Will Thomas Be Borked?: Views Are Fair Game," Washington Times, July 12, 1991.

the American Way Action Fund has only once before opposed a nominee to the Supreme Court. Moreover, Mr. Thomas is only the second African-American nominated to the high Court. He is a man with a compelling personal story of overcoming discrimination and poverty. Nonetheless, after carefully analyzing his record and views, we are absolutely convinced that Clarence Thomas' nomination to the highest court is not in the best interests of the nation.

#### **L LIMITED EXPERIENCE – NOT THE ‘BEST MAN FOR THE JOB’**

The Supreme Court should be the place where our nation's most distinguished lawyers and jurists decide the thorniest issues of the day. The members of the Court should have great stature, achieved through long, celebrated careers in the law. Service on the Supreme Court should be reserved for those who are truly the best and brightest that this nation has to offer.

President Bush said that he nominated Clarence Thomas because Mr. Thomas was "the best man for the job on the merits." This statement is transparently false. For all his accomplishments, Clarence Thomas is obviously not the most qualified person, not even the most qualified conservative, and far from the most qualified Republican African-American or Hispanic, to fill the vacancy on the Supreme Court. Former Solicitor General Erwin Griswold recently said: "This is a time when [President] Bush should have come up with a first-class lawyer, of wide reputation and broad experience, whether white, black, male or female. And that, it seems to me obvious, he did not do." Griswold complained that Mr. Thomas "has no breadth of experience at all."<sup>5</sup>

Mr. Thomas served for nine years, more than half of his professional life, as an official in the Reagan and Bush administrations. As documented in detail later in this report, Mr. Thomas' tenure in these positions was marred by proven allegations of lax enforcement and disrespect for the law -- notable largely for Mr. Thomas' conflicts with Congress and the courts.

For the past 17 months, Mr. Thomas has been a judge on the Court of Appeals for the District of Columbia. Although he has participated in some 170 appeals, during this period

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<sup>5</sup> Tony, "At 87, Erwin N. Griswold is the Dean of Supreme Court Observers," Washington Post, July 15, 1991.

Mr. Thomas has written only 17 majority opinions, all but one of which was a unanimous decision. Mr. Thomas has written separate concurring or dissenting opinions in only three cases.

Most of the cases in which Mr. Thomas played a part were unanimous and relatively uncontroversial cases. Two of the occasions on which Mr. Thomas chose to write separately from the majority do, however, raise concerns because both opinions specifically address critical issues involving the scope of judicial review. In both instances, Mr. Thomas argued for limiting access to the courts, once on the basis of standing, and once on the grounds of mootness.

In Cross Sound Ferry Services v. ICC,<sup>6</sup> Mr. Thomas maintained that the Court should have dismissed plaintiff's complaint on the grounds of standing. The court found that the Interstate Commerce Commission had properly decided that certain ferry services were exempt from ICC regulation. Mr. Thomas agreed with this portion of the decision. The majority further concluded that this ICC decision did not trigger environmental review responsibilities under National Environmental Policy Act (NEPA) and the Coastal Zone Management Act (CZMA). Mr. Thomas dissented from the ruling on the applicability of the environmental statutes, arguing that the plaintiff did not have standing to raise the environmental claims. While the majority found that the environmental claims did not have merit, Mr. Thomas would not even have addressed the merits of the petitioner's complaint.

Similarly, Mr. Thomas dissented in Doe v. Sullivan,<sup>7</sup> arguing that the case should have been dismissed on the grounds of mootness. Doe, which was decided on July 16, 1991, involved a regulation that permitted the use of unapproved drugs to protect troops from chemical weapons during the Gulf War. A serviceman challenged the regulation. The government argued that the court should have found the plaintiff's claim moot because the regulation had been terminated. The majority ruled that the claim was not moot, holding that the controversy was "capable of repetition, yet evading review" because the underlying regulation that permitted the waiver of the ordinary drug approval process was still in effect. The majority then dismissed plaintiff's claims on the merits. Mr. Thomas took exception. He wrote: "The war has ended and the troops are home, but to the majority the case lives

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<sup>6</sup> \_\_\_ F.2d \_\_\_, No. 90-1053 (D.C. Cir. May 10, 1991).

<sup>7</sup> \_\_\_ F.2d \_\_\_, No. 91-5019, (D.C. Cir. July 16, 1991).

on.<sup>8</sup> Rather than considering plaintiff's complaint, Mr. Thomas would have simply closed the courthouse door.

Overall, Mr. Thomas' record as a judge is extremely limited. However, the rest of Mr. Thomas' record, as revealed in speeches and articles about key legal precedents and policy questions, and as shown in Mr. Thomas' performance as an official in the Reagan and Bush administrations, is extremely troubling.

## II. CRITICISM OF KEY SUPREME COURT PRECEDENTS

Mr. Thomas has attacked the results and legal underpinnings of a dozen landmark Supreme Court decisions of the past four decades. Mr. Thomas' criticisms focus on Supreme Court rulings involving fundamental rights with respect to privacy, workplace discrimination and school segregation, as well as congressional authority under the Constitution. These criticisms are not simply abstract or theoretical; he has severely attacked a number of Court decisions, even going so far in one case as to urge lower courts to follow the dissent and not the majority opinion.

### A. The Right to Privacy

The Supreme Court first enunciated the constitutional right to privacy in Griswold v. Connecticut, a 1965 decision striking down a Connecticut law banning the sale of contraceptives.<sup>9</sup> Griswold, in turn, became the foundation for the Court's decision in Roe v. Wade, where the Court held that the right to privacy included a woman's right to choose an abortion.<sup>10</sup>

Mr. Thomas has criticized Griswold, however, particularly a concurring opinion signed by Chief Justice Warren and Justices Goldberg and Brennan, which relied on the Ninth Amendment as the foundation for the right to privacy. Just three years ago, Mr. Thomas complained of the Court's improper "invention" of the Ninth Amendment in Griswold, and

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<sup>8</sup> Id. Slip. op. at 1 (Thomas, J. dissenting).

<sup>9</sup> 381 U.S. 479 (1965).

<sup>10</sup> 410 U.S. 113 (1973).

wrote that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom."<sup>11</sup>

Mr. Thomas has also suggested that he finds fault with Roe v. Wade. In a 1987 speech, Mr. Thomas lavishly praised an article arguing not only that Roe should be overturned, but that fetuses should be granted constitutional protection.<sup>12</sup> The article, which Mr. Thomas called a "splendid example of applying natural law," was an unbridled attack on Roe written by anti-abortion activist Lewis Lehrman.<sup>13</sup> Lehrman asserted that the right to choose abortion recognized in Roe is "a spurious right" with "not a single trace of lawful authority" that has produced a "holocaust". The Lehrman article that Mr. Thomas so heartily endorsed takes the most extreme position on choice, insisting that abortion is prohibited by the Constitution and that neither Congress nor the states may protect the right to choose an abortion.<sup>14</sup>

In addition to his personal criticism of key Court precedent concerning the right to privacy, Mr. Thomas was a member in 1986 of a White House Working Group on the Family that produced a report sharply critical of Court decisions in this area. The report disparages Roe v. Wade and Planned Parenthood v. Danforth,<sup>15</sup> which ruled unconstitutional a state law preventing a woman from obtaining an abortion without her husband's consent. The report also attacked the reasoning of Eisenstadt v. Baird, which held that the right of privacy protects the rights of unmarried people to use contraceptives,<sup>16</sup> and Moore v. City of East Cleveland, which struck down a zoning law forbidding a grandmother from living, in extended family fashion, with her son and grandsons.<sup>17</sup> The report pointedly notes that such

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<sup>11</sup> Thomas, "Civil Rights as a Principle versus Civil Rights as an Interest," Assessing the Reagan Years (D. Boaz, ed. 1988) at 399 (hereinafter "Principle versus Interest").

<sup>12</sup> Thomas, Speech before the Heritage Foundation, June 18, 1987, at 22.

<sup>13</sup> Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," The American Spectator, Apr. 1987, at 21.

<sup>14</sup> Id.

<sup>15</sup> 428 U.S. 52 (1976).

<sup>16</sup> 405 U.S. 438 (1972).

<sup>17</sup> 431 U.S. 494 (1971).

"fatally flawed" decisions could be "corrected" either by Constitutional amendment or through "the appointment of new judges and their confirmation by the Senate."<sup>18</sup>

## B. Workplace Discrimination

Mr. Thomas has also taken aim at a broad range of employment discrimination decisions -- rulings that helped break down barriers to the hiring and advancement of women and minorities in the workplace.

For example, Judge Thomas criticized the Court's ruling in United Steel Workers v. Weber, upholding voluntary affirmative action programs by private employers<sup>19</sup> and its decision in Johnson v. Transportation Agency, Santa Clara County, permitting a state employer's voluntary affirmative action programs for job categories traditionally segregated against women.<sup>20</sup> Mr. Thomas called these decisions an "egregious example" of misinterpretation of the equal protection clause and legislative intent in civil rights statutes.<sup>21</sup> In fact, he has specifically suggested the overruling of Johnson, and went so far as to state that he hoped Justice Scalia's dissent in the case would "provide guidance for lower courts and a possible majority in future decisions."<sup>22</sup>

Mr. Thomas voiced similar concerns about the Court's holding in Fullilove v. Klutznick, in which the Court ruled that Congress has the power to pass remedial legislation to correct past discrimination.<sup>23</sup> Mr. Thomas charged that the Court in Fullilove improperly "reinterpre[ed] civil rights laws to create schemes of racial preference where none was ever contemplated."<sup>24</sup>

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<sup>18</sup> White House Working Group on the Family, The Family: Preserving America's Future, 1986, at 12.

<sup>19</sup> 443 U.S. 193 (1979).

<sup>20</sup> 480 U.S. 616 (1987).

<sup>21</sup> "Principle Versus Interest" at 395.

<sup>22</sup> Thomas, Speech before the Cato Institute, Apr. 23, 1987, at 20-21.

<sup>23</sup> 448 U.S. 448 (1980).

<sup>24</sup> "Principle Versus Interest" at 396.

Mr. Thomas also objected to the Court's rulings in three employment discrimination cases dealing with court-ordered remedies and consent decrees. In Local 28 Sheet Metal Workers International v. EEOC, the Court upheld court-ordered affirmative action as a remedy for egregious and longstanding discrimination.<sup>25</sup> In Firefighters v. Cleveland, the Court approved consent decrees including affirmative action measures in job-bias cases.<sup>26</sup> Finally, in United States v. Paradise, the Court upheld an affirmative action remedy for egregious bias where an employer resisted previous anti-discrimination orders.<sup>27</sup> Mr. Thomas criticized all three cases by name, expressing "personal disagreement with the Court's approval of numerical remedies."<sup>28</sup>

### C. School Segregation

Mr. Thomas has also attacked several landmark rulings in the area of school desegregation. Most notably, he criticized the reasoning in the Court's historic opinion in Brown v. Board of Education, in which the Court confronted and struck down as unconstitutional school segregation and the notion of "separate but equal" schools.<sup>29</sup>

Mr. Thomas has disparaged Brown as being based on "dubious social science" and containing a "great flaw."<sup>30</sup> Mr. Thomas has said that the proper ground for outlawing segregation in Brown would have been the privileges and immunities clause of the Fourteenth Amendment, even though Mr. Thomas himself admits that this clause has been made meaningless as a source of authority for the Court since 1873.<sup>31</sup> Mr. Thomas has also

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<sup>25</sup> 478 U.S. 421 (1986).

<sup>26</sup> 478 U.S. 501 (1986).

<sup>27</sup> 480 U.S. 149 (1987).

<sup>28</sup> Thomas, "Affirmative Action Goals and Timetables," 5 Yale L. and Pol. R. 402 at 403 (1987).

<sup>29</sup> 347 U.S. 483 (1954).

<sup>30</sup> Thomas, Speech before the Federalist Society for Law and Public Policy Studies, University of Virginia Law School, Charlottesville, Virginia, Mar. 5, 1988, at 11; Thomas, "Toward a 'Plain Reading' of the Constitution," 30 Howard L. J. 985 at 990 (1987).

<sup>31</sup> 30 Howard L. J. at 994.

specifically disagreed with the Court's premise in Brown that separate is inherently unequal.<sup>23</sup>

In the years following Brown, many school authorities sought to circumvent the decision by contriving new methods for assigning students to schools – methods that were designed to produce segregated schools. In Green v. County Board of Education, the Supreme Court was faced with one such system. The Court held that the so-called "freedom of choice" assignment system used by many school districts to avoid desegregation was incompatible with Brown and held that all vestiges of state-imposed segregation must be eliminated.<sup>24</sup>

Mr. Thomas described the Court's decision in Green as reflecting a "lack of principle."<sup>24</sup> Mr. Thomas has complained that, according to Green, the decision in Brown "not only ended segregation, but required school integration."<sup>25</sup>

In the key decision of Swann v. Charlotte-Mecklenberg Board of Education, the Court held that courts may order student reassignment, transportation, and other remedies to fully realize the promise of Brown.<sup>26</sup> Although not mentioning Swann by name, Mr. Thomas has denounced what he terms "a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education" after Green.<sup>27</sup>

#### D. Congressional Authority under the Constitution

Mr. Thomas has also criticized several key Court decisions upholding the authority of Congress under the Constitution. As discussed above, he has disparaged the decision in Fullilove, where the Court ruled that Congress has the power to enact legislation to remedy the effects of past discrimination. In addition, he has attacked the Court's important holding

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<sup>23</sup> Williams, "A Question of Fairness," Atlantic Monthly, February, 1987, at 72.

<sup>24</sup> 391 U.S. 430 (1968).

<sup>24</sup> "Principle Versus Interest" at 393.

<sup>26</sup> Id.

<sup>26</sup> 402 U.S. 1 (1971).

<sup>27</sup> "Principle Versus Interest" at 393.

in Morrison v. Olson, where the Court ruled 7-1 that Congress could properly create independent prosecutors such as those which investigated Watergate and Iran-Contra.<sup>39</sup> The lone dissent was by Justice Scalia, who argued that Congress had absolutely no authority to appoint special prosecutors, no matter how serious a crime may have been committed by Executive branch officials. According to Mr. Thomas, however, Justice Scalia's dissent was "remarkable" and should have been followed, while Chief Justice Rehnquist's majority opinion "failed not only conservatives but all Americans."<sup>40</sup>

### III. UNWILLINGNESS TO FOLLOW ESTABLISHED LAW

#### A. Controversial Tenure as Chair of the EEOC

Mr. Thomas' most significant legal experience is the eight years he served as Chair of the Equal Employment Opportunity Commission, the agency with prime responsibility for enforcing federal laws forbidding employment discrimination. During this period, Mr. Thomas repeatedly displayed a failure and unwillingness to enforce fully federal anti-discrimination laws as mandated by Congress. He frequently denounced court-approved methods of establishing discrimination and remedies for workplace discrimination. In many instances, Mr. Thomas appeared not to believe in the very laws he was sworn to enforce, especially the laws forbidding discrimination against older workers. Congress and the courts had to intervene to require Mr. Thomas to enforce the law. Throughout his tenure as an executive branch official, Mr. Thomas demonstrated aggressive hostility to congressional oversight and direction.

One particularly disturbing example of Mr. Thomas' behavior at the EEOC was his attempt to reverse the Commission's long-standing policy of seeking goals and timetables in conciliation efforts and court-approved settlements. Mr. Thomas attempted to justify his shift by arguing that the Supreme Court's decision in Firefighters Local Union No. 1984 v. Stotts<sup>41</sup> required that the agency stop seeking goals and timetables.<sup>41</sup> Mr. Thomas'

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<sup>39</sup> 106 S.Ct. 2597 (1988).

<sup>40</sup> See Barnes, "Weirdo Alert," The New Republic, Aug. 5, 1991, at 7.

<sup>41</sup> 467 U.S. 561 (1984).

<sup>42</sup> Regulatory Program of the United States, August, 1985.

conclusion was extraordinary because the Court in *Stotts* was very careful to say that its decision simply allowed employers to use a seniority system that had an adverse impact on minority employees, not that the Constitution required it. To conclude, as Mr. Thomas did, that the Court prohibited the long-accepted practice of employing goals and timetables was a tortured reading of the decision, a reading that seemed to be motivated by a personal hostility to these types of remedies. In fact, Mr. Thomas' statement about *Stotts* directly contradicted a representation he himself had made to Congress in August, 1984, where he wrote that *Stotts* "does not require the EEOC to reconsider stated policies with respect to the availability of numerical goals and similar forms of affirmative action relief."

Mr. Thomas was widely criticized for his shift concerning *Stotts*, and in 1986, the Supreme Court firmly rejected Mr. Thomas' revised reading of the case, reiterating that goals and timetables are constitutionally permissible remedies for employment discrimination under appropriate circumstances.<sup>43</sup> However, even in the face of this long line of authority, Mr. Thomas continued to voice his "personal disagreement" with the Supreme Court's approach, and insisted that the use of goals and timetables "turns the law against employment discrimination on its head."<sup>44</sup>

Mr. Thomas' purposeful misreading of *Stotts* is emblematic of his defiant refusal to enforce anti-discrimination laws and his willingness to allow his personal policy preferences to take precedence over established law. A particularly egregious example of this problem can be found in the EEOC's failure to enforce the Age Discrimination in Employment Act (ADEA).

In 1987 and 1988, Congress discovered that the EEOC under Mr. Thomas had failed to act on more than 13,000 cases charging violations of ADEA. This failure to act reflects a callous disregard for the legal rights of older workers.

Perhaps even more troubling than this dereliction of duty was Mr. Thomas' response once the problem was discovered. Mr. Thomas was extremely uncooperative with Congress. When he was first asked by the Senate Special Committee on Aging about the number of ADEA cases whose time limits had lapsed, Mr. Thomas reported that 78 cases had expired.

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<sup>43</sup> See *Local Number 93, International Association of Firefighters, AFL-CIO C.I.C. v. City of Cleveland*, 478 US 501 (1986); *Local 28 Sheet Metal Workers' International Association v. EEOC*, 478 US 421 (1986); and *United States v. Paradise*, 480 U.S. 149 (1987).

<sup>44</sup> Thomas, 5 Yale L. & Pol. R. at 403, n. 3.

However, the EEOC's own information revealed at this point that well over 1,000 cases had lapsed. After published news reports brought attention to the problem of lapsed cases, Mr. Thomas reluctantly confirmed that the statute of limitations had run on over 900 cases. These estimates were later revised to over 1,500, then to over 7,500, and finally to more than 13,000 lapsed claims.<sup>44</sup>

Instead of cooperating with Congress in investigating and resolving this massive problem, Mr. Thomas repeatedly complained about Congress' role in overseeing the EEOC, and refused to cooperate with the Senate oversight committee. Eventually, the Senate Aging Committee had to resort to a subpoena to obtain the EEOC's records on lapsed cases. Even when the Aging Committee's investigation turned up evidence of gross dereliction of duty by the EEOC, Mr. Thomas still attacked Congress. He at one point complained that a "willful committee staffer . . . succeeded in getting a Senate Committee to subpoena volumes of EEOC records."<sup>45</sup> Mr. Thomas added that "it will take weeks of time, and costs in the hundreds of thousands of dollars, if not in the millions. Thus, a single unselected individual can disrupt civil rights enforcement--and all in the name of protecting rights."<sup>46</sup>

Ultimately, Congress had to pass special legislation to restore the rights of these older workers whose claims the EEOC had allowed to lapse.<sup>47</sup> This incident is representative of a pattern in which Congress had to pass legislation to address problems created by Mr. Thomas' administration of the EEOC.<sup>48</sup>

Mr. Thomas' actions with respect to employers' obligation to make pension contributions for workers over age 65 is another example of his failure to protect older workers' interests. Mr. Thomas pledged to rescind an improper Department of Labor interpretation stating that employers were not required to make pension contributions for workers older than age 65, but never carried through on his promise. After four years of

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<sup>44</sup> Letter to the President by 14 Members of Congress, July 17, 1969; United States Senate, Committee on the Judiciary, Nomination Hearing for Clarence Thomas to be a Judge on the United States Court of Appeals for the District of Columbia, Feb. 6, 1990, at 90.

<sup>45</sup> Speech before the Federalist Society, University of Virginia, Mar. 5, 1988, at 13.

<sup>46</sup> *Id.*

<sup>47</sup> "EEOC Raises Number of Mismatched Age Discrimination Cases to 7,546," *Los Angeles Times*, June 25, 1988 at Part IV, p. 1.

<sup>48</sup> Letter to the President by 14 Members of Congress, July 17, 1969.

agency inaction under Mr. Thomas, Congress passed an amendment to the ADEA requiring pension contributions. Still, the agency did not rescind the incorrect regulation until ordered to do so by a federal court, and failed to issue new regulations on pension accruals in a timely fashion. As a consequence of EEOC inaction, older workers lost benefits valued at as much as \$450 million per year. As U.S. District Court Judge Harold Greene wrote in finding against the EEOC, the agency "has at best been slothful, at worst deceptive to the public, in the discharge of [its] responsibilities."<sup>49</sup>

Similarly, in 1987, over vocal objections from Congress and the senior community, the EEOC issued a regulation permitting employers to ask older workers to waive their ADEA rights even before any discrimination claim existed and without the supervision or approval of the EEOC. Congress responded by passing riders on the 1988, 1989, and 1990 EEOC appropriation to prevent the Commission from implementing the new rule on unsupervised waivers. Even in the face of this Congressional action, Mr. Thomas continued to oppose EEOC supervision.

The extent and seriousness of the problems with Mr. Thomas' performance at the EEOC were brought to the fore when Mr. Thomas surfaced as a possible nominee to the Court of Appeals. Fourteen Members of Congress who served on subcommittees with oversight responsibilities for the EEOC took the extraordinary step of writing to President Bush, asking that Mr. Thomas not be nominated to the federal bench. According to these Members of Congress, Mr. Thomas' "questionable enforcement record" at the EEOC "frustrates the intent and purpose" of the Civil Rights Act of 1964. In addition, the letter took strong exception to Mr. Thomas' lack of candor in dealing with the oversight committees, and concluded that Mr. Thomas "has demonstrated an overall disdain for the rule of law."<sup>50</sup>

#### B. Questionable Performance as Director of the Office of Civil Rights in the Department of Education

Mr. Thomas' tenure at the EEOC has received the most attention to date. However, before becoming Chair of the EEOC, Mr. Thomas served for one year as Director of the

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<sup>49</sup> AARP v. EEOC, 655 F.Supp. 228, 229 (D.D.C.), *aff'd in part, rev'd in part*, on other grounds, 823 F.2d 600 (D.C. Cir. 1987).

<sup>50</sup> Letter to President Bush by 14 Members of Congress, July 17, 1989.

Office of Civil Rights (OCR) in the Department of Education. During this short period, Mr. Thomas manifested a similar pattern of flouting established law. Mr. Thomas admitted in federal court that he had violated his legal obligations governing civil rights enforcement at OCR. In addition, Mr. Thomas' failure to enforce civil rights protections was so serious that on three separate occasions, OCR actions were opposed even by the Reagan Justice Department.

During Mr. Thomas' tenure, OCR was governed by a court order issued in the Adams v. Bell litigation, which required that OCR meet specified time limits in processing complaints and taking other enforcement action. This order was necessary because of a "general and calculated default" over a period of years in enforcing civil rights laws in education.<sup>33</sup> In 1982, while Mr. Thomas was head of OCR, the Adams court held a hearing concerning charges that OCR was failing to comply with the court order.

At the hearing, Thomas specifically admitted that he was violating the court order's requirements for processing civil rights cases:

Q: . . . But you're going ahead and violating those time frames; isn't that true? You're violating them in compliance reviews on all occasions, practically, and you're violating them on complaints most of the time, or half the time; isn't that true?

A: That's right.

Q: So aren't you, in effect, substituting your judgment as to what the policy should be for what the court order requires? The court order requires you to comply with this 90 day period; isn't that true?

A: That's right....

Q: And you have not imposed a deadline [for an OCR study concerning lack of compliance with the Adams order]; is that correct?

A: I have not imposed a deadline.

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<sup>33</sup> See H.Rep. 99-458 (1985) at 5.

Q: And meanwhile, you are violating a court order rather grievously, aren't you?

A: Yes.<sup>23</sup>

Shortly after Mr. Thomas' testimony, the federal court in Adams in fact found that the court's order "has been violated in many important respects."<sup>23</sup>

One reason that Mr. Thomas failed to comply with the Adams order is that OCR placed "holds" on the processing of certain kinds of civil rights complaints while it considered or reconsidered its policies. As a memorandum to Mr. Thomas from his deputy pointed out, the use of hold categories not only "impeded the timely processing of a number of OCR cases" but also "stifled morale in OCR."<sup>24</sup>

In 1982, even the Reagan Justice Department protested OCR's refusal to enforce civil rights laws through the continuation of "hold" categories. OCR was suspending processing of complaints of improper job discrimination against the handicapped by universities and other recipients of federal education aid. Assistant Attorney General Bradford Reynolds wrote to Mr. Thomas, specifically questioning "the propriety of refusing to process" such complaints in most states, and pointedly requested that Mr. Thomas promptly notify OCR offices to "begin accepting, investigating and, where appropriate, remedying" those complaints.<sup>25</sup> Even after this complaint from the Department of Justice, which occurred less than a month after the court found significant violations of the Adams order, Mr. Thomas took no action to remedy this violation of law.

In addition, during Mr. Thomas' tenure, OCR finalized the implementation of a procedure called ECR, or Early Complaint Resolution.<sup>26</sup> Under ECR, OCR would seek to settle civil rights complaints in non-class action cases before an investigation had even begun.

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<sup>23</sup> Transcript of Hearing in WEAL and Adams v. Bell, D.D.C., Mar. 12, 1982, at 48, 51.

<sup>24</sup> Adams transcript, Mar. 15, 1982, at 3.

<sup>25</sup> Memorandum to Clarence Thomas from Michael Middleton, Dec. 3, 1981, at 1.

<sup>26</sup> Letter to Clarence Thomas from William Bradford Reynolds, Apr. 9, 1982.

<sup>27</sup> See Adams transcript at 20.

During Mr. Thomas' tenure, in November, 1981, the Justice Department specifically alerted OCR of its "major concern" that the use of ECR did not meet applicable standards and "could lead to a weakening of your enforcement posture and our litigation position."<sup>37</sup> According to a House Committee that investigated the use of ECR, however, no significant changes were made by Thomas or his successor in this area, despite Justice's complaint and its request that the use of ECR be closely monitored. By 1985, the Committee reported, 312 cases had been settled through ECR, and OCR could not assure the committee that "any or all of the ECR settlements were in accordance with statutory or regulatory requirements."<sup>38</sup> As the House Committee concluded, however, the use of ECR "may be illegal, may not protect the rights of complainants, and may jeopardize future litigation involving violations of civil rights laws."<sup>39</sup>

Mr. Thomas was also involved in a blatant attempt in 1981 by the Department of Education to change its position and undermine enforcement of sex discrimination laws. Since the mid-1970s, federal regulations provided that it was illegal for universities or other recipients of federal education funds to commit job bias on the basis of sex.<sup>40</sup> In 1981, however, even as the Supreme Court was considering a case challenging the Department of Education rules, Mr. Thomas announced that the Department was about to reverse its position and argue that the anti-sex discrimination law "does not cover employment."<sup>41</sup>

In fact, two weeks after Thomas' announcement, Education Secretary Bell wrote to the Justice Department to seek permission to repeal the anti-sex discrimination rules and effectively to concede that they were invalid in the Supreme Court.<sup>42</sup> The Justice Department refused, rejecting this apparent attempt by Mr. Thomas and Secretary Bell to seriously weaken anti-discrimination protections.<sup>43</sup> The Supreme Court repudiated the

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<sup>37</sup> Letter from Stewart B. Oneglia, Civil Rights Division, Department of Justice to Kristine M. Marcy, Office of Civil Rights, Nov. 13, 1991.

<sup>38</sup> H. Rep. 99-458 at 29.

<sup>39</sup> See H.Rep. 99-458 at 27.

<sup>40</sup> See 34 CFR 106.51-61 (1975).

<sup>41</sup> UPI Release, July 13, 1981.

<sup>42</sup> See BNA Daily Labor Report, Aug. 5, 1981, at p. A-5 (reprint of letter of July 27, 1981).

<sup>43</sup> See North Haven Board of Educ. v. Bell, 456 U.S. 509, 522 n. 12 (1982).

Thomas-Bell position, ruling that the regulations were valid and that the anti-sex bias law did in fact prohibit employment discrimination.<sup>64</sup>

#### IV. HOSTILITY TO LEGISLATIVE AUTHORITY

The need for Supreme Court justices to respect the will and intent of Congress is well established. Much of the Court's work involves interpretation of statutory language and congressional intent. In recent years, conservative justices have undermined many statutes, most notably in the areas of civil rights and family planning legislation. These Court decisions have damaged privacy interests and civil rights protections, and have led to congressional efforts to overrule the Court decisions.<sup>65</sup>

Mr. Thomas' attitude towards the legislative function suggests that, if confirmed, he would further the Court's disturbing trend in this area. Mr. Thomas' record at the Office of Civil Rights and the EEOC, as described above, contains numerous examples of actions and statements contrary to existing law. This disrespect for Congress is even clearer in his writings and speeches.

For example, Mr. Thomas has frequently condemned Congress, and commented that willful violations of its intentions are to be applauded.<sup>66</sup> In a speech on the role of Congress in the formation of public policy, Mr. Thomas said that "it may surprise some but Congress is no longer primarily a deliberative or even a law-making body... [T]here is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."<sup>67</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> See, for example, H.R. 1 (1991) (the Civil Rights Act of 1991, attempting to overrule a series of Supreme Court decisions narrowing the scope of employment discrimination and civil rights laws); S. 323, H.R. 392 (1991) (attempting to overrule *Rust v. Sullivan*, which upheld a rule forbidding doctors at federally funded health clinics from providing patients with information about abortion).

<sup>66</sup> Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988.

<sup>67</sup> Thomas, Speech to the Gordon Public Policy Center, Brandeis University, Waltham, Massachusetts, April 8, 1988, at 4.

In his 1988 speech, Mr. Thomas specifically attacked Congress' oversight activity. Mr. Thomas focused his criticism on three members of the Senate Labor and Human Resources Committee who simply requested that Mr. Thomas at the time of his 1986 re-nomination as head of the EEOC keep them apprised of the EEOC's work by submitting semi-annual reports. Mr. Thomas referred to this oversight as an "intrusion" into the administrative deliberative process.<sup>68</sup>

A further example of Mr. Thomas' contempt for the legislative process and the rule of law can be found in his repeated praise for Oliver North. In one speech, Mr. Thomas said that the congressional committee "beat an ignominious retreat before Colonel North's direct attack on it, and by extension all of Congress."<sup>69</sup> In another speech, while decrying Congress' role in overseeing the federal bureaucracy, he noted that "as Ollie North made perfectly clear last summer, it is Congress that is out of control!"<sup>70</sup> This praise for North's open flouting of Congress and the Constitution is wholly inappropriate from someone being considered for the Supreme Court, whose respect for the Constitution, the separation of powers, and the rule of law must be beyond reproach.

Mr. Thomas' harsh disparagement of congressional authority is particularly troubling in light of his belief that Congress does not even have the power to create a special prosecutor to investigate executive branch misconduct and his own refusal at OCR and EEOC to comply with the law. These aspects of Mr. Thomas' record strongly suggest that, if confirmed, he would join justices like Rehnquist and Scalia in seeking to undermine congressional statutes protecting individual rights and liberties and to limit improperly congressional authority under the Constitution.

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<sup>68</sup> *Id.* at 5.

<sup>69</sup> Thomas, Speech before the Cato Institute, Washington, D.C., Oct. 2, 1987, at 13.

<sup>70</sup> Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988, at 13 (emphasis in original).

## V. JUDICIAL PHILOSOPHY: ADHERENCE TO A 'DISCREDITED'<sup>71</sup> THEORY OF NATURAL LAW

Mr. Thomas' overall judicial philosophy is centered on a belief in "natural law" or "higher law". According to Mr. Thomas, there are fixed objective truths in natural law that somehow trump or override the Constitution or other written law.<sup>72</sup> Mr. Thomas asserts that the Supreme Court is justified in overturning the decisions of "run-amok majorities" and "run-amok judges" as long as it adheres to natural law.<sup>73</sup> Legal scholars and judges have recognized, however, that this emphasis on natural law is extraordinarily troubling, and the theory has been rejected as a basis for constitutional analysis for over fifty years. Geoffrey Stone, dean of the University of Chicago Law School has characterized Mr. Thomas' ideas as "strange" and "further outside the mainstream of constitutional interpretation than Bork."<sup>74</sup>

Legal scholars have explained that there are no fixed "higher law" principles that can override the Constitution. Indeed, as Professor John Hart Ely has noted: "natural law has been summoned in support of all manner of causes in this country -- some worthy, some nefarious -- and often on both sides of the same issue."<sup>75</sup> Professor Gary McDowell recently wrote: "To suggest that the Constitution sprang from and rests upon the natural law teaching of the Declaration of Independence is one thing; but to argue that it is appropriate for judges to claim recourse to that body of law in deciding the cases that come before them is quite a different matter."<sup>76</sup>

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<sup>71</sup> J. Ely, Democracy and Distrust, (1980), at 50.

<sup>72</sup> See, e.g., Thomas, Speech before the Heritage Foundation, Washington, D.C., June 18, 1987, at 22; Thomas, "The Higher Law Background of the Privileges or Immunities Clause," 12 Harv. J. of L. and Pub. Pol. 63 (1989) (hereinafter "Higher Law"); Thomas, Speech before the U.S. Department of Justice -- Dr. Martin Luther King, Jr. Holiday Observance, Washington, D.C., Jan. 16, 1987, at 6.

<sup>73</sup> "Higher Law" at 64; Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988, at 2.

<sup>74</sup> Page, "Will Thomas be Borked?: Views Are Fair Game," Washington Times, July 12, 1991.

<sup>75</sup> See J. Ely, Democracy and Distrust, at 50, (1980); Tribe, New York Times, July 12, 1991.

<sup>76</sup> McDowell, "Doubting Thomas: Is Clarence a Real Conservative?," The New Republic, July 29, 1991, at 15.

Despite his belief in unwritten, natural law, Mr. Thomas has attacked one of the most important Supreme Court decisions protecting rights not explicitly mentioned in the Constitution, Griswold v. Connecticut.<sup>77</sup> In Griswold, the Court ruled that the Constitution protects the right of privacy-- not because of higher, natural law superior to the Constitution, but because the right of privacy is implicit in written Constitutional guarantees and traditions. One part of the basis for Griswold was the Ninth Amendment, which provides that rights need not be explicitly enumerated in the Constitution to be protected. Notwithstanding his belief in fixed principles of unwritten natural law not mentioned expressly in the Constitution, however, Mr. Thomas has criticized Griswold because of its "invention" of the Ninth Amendment, asserting that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom."<sup>78</sup> Mr. Thomas' views on the Ninth Amendment, particularly in light of his views on natural law, are extremely troubling.

In fact, Mr. Thomas' applications of natural law could result in dangerous and dramatic reversals of Supreme Court precedents. Mr. Thomas has used natural law analysis to severely criticize the Supreme Court's reasoning in Brown v. Board of Education<sup>79</sup> as well as the right to privacy.<sup>80</sup> He has praised as a "splendid example of applying natural law" an article that urged overturning Roe v. Wade and establishing a constitutional imperative against abortion.<sup>81</sup> Mr. Thomas' belief that natural law requires that the government be "color-blind" in all actions has led him to disagree with virtually every Supreme Court decision that approved of affirmative action, even in cases involving intentional discrimination. In other instances, Mr. Thomas has suggested that natural law analysis protects economic liberty, and that government regulation somehow violates natural

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<sup>77</sup> 381 U.S. 479 (1965).

<sup>78</sup> "Principle versus Interest" at 399.

<sup>79</sup> Thomas, "The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?," Speech before the Tocqueville Forum, Wake Forest University, Winston-Salem, North Carolina, Apr. 19, 1988, at 16.

<sup>80</sup> Thomas, "Higher Law," at 63, n. 2.

<sup>81</sup> Thomas, Speech to Heritage Foundation, June 18, 1987, praising Letzman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," The American Spectator, Apr. 1987, at 21.

law.<sup>82</sup> Indeed, Mr. Thomas has severely criticized regulatory legislation such as minimum wage laws.<sup>83</sup>

The natural law theme pervades Mr. Thomas' speeches and writings since the beginning of 1987. Between January 1987 and April 1988, Mr. Thomas gave at least 11 speeches in which he discussed natural law. He has published at least eight articles that argue for natural law analysis. The theme is constant, the endorsement is unequivocal. In light of Thomas' criticism of fundamental Court precedents concerning privacy and civil rights, as well as the important cases the Supreme Court will be deciding in these areas in the future, Mr. Thomas' natural law views are cause for serious concern.

## VI. CONCLUSION

When Clarence Thomas was nominated to the Court of Appeals 18 months ago, the People For the American Way Action Fund expressed serious reservations but stopped just short of opposing his confirmation. Nominated to the Supreme Court, he must be held to a higher standard. The power of a Supreme Court justice is infinitely greater. Lower court judges are required to follow the guidance of the Supreme Court, and are subject to appellate review. On the Supreme Court, particularly the Court under the leadership of Chief Justice Rehnquist, the stricture of following precedent is largely removed, and there is no appeal.

Based on a thorough examination of Mr. Thomas' record as a judge and government official, and the opinions he has expressed in hundreds of articles and speeches, we believe that, were he confirmed by the Senate, Clarence Thomas would pose a substantial threat to the right to privacy and to efforts to combat discrimination. Mr. Thomas' record indicates a willingness to overturn precedents involving fundamental individual liberties and civil rights. His turbulent tenure at the EEOC and his oft-expressed distaste for the legislative branch suggest that he would join forces with those justices who willingly disregard legislative directives in favor of their personal policy preferences.

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<sup>82</sup> Thomas, Speech before the American Bar Association, Luncheon Meeting of Business Law Section, Aug. 11, 1987, at 14.

<sup>83</sup> See "Black America Under the Reagan Administration," Policy Review, Fall 1985, at 37.

One of the key arguments the Bush Administration has highlighted in campaigning for Clarence Thomas is that his experiences will make him a defender of victims of poverty and discrimination. Mr. Thomas' personal history merits praise, but his public record contradicts the Administration's assertion. We agree with Rep. John Lewis' response to that argument: "Look at his record. He has forgotten from whence he has come."<sup>64</sup>

On behalf of the Board of Directors and members of the People For the American Way Action Fund, we call upon the United States Senate, in the exercise of its co-equal role in the selection of Supreme Court justices, to reject the nomination of Clarence Thomas.

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The People for the American Way Action Fund is a 300,000-member, nonpartisan constitutional liberties organization. People For was a leader in the effort to defeat the nomination of Robert Bork to the Supreme Court. For more information, or to arrange interviews, contact the People For Communications Department at 202/467-4999.

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<sup>64</sup> Lewis, "Why I Oppose the Thomas Nomination," July 16, 1991.

The CHAIRMAN. Thank you very much, Congressman.  
Mr. Chambers.

#### STATEMENT OF JULIUS CHAMBERS

Mr. CHAMBERS. Thank you, Mr. Chairman. Thank you for permitting me to address the committee on behalf of the NAACP Legal Defense and Educational Fund.

I serve as director counsel of the NAACP Legal Defense Fund, a position previously held by retiring Justice Thurgood Marshall and Jack Greenberg, who is now dean of Columbia University.

The legal defense fund played a major role in litigating most of the civil rights cases during the past 50 years. We have litigated more than 500 cases in the U.S. Supreme Court, including many of those that this committee discussed during these proceedings—

The CHAIRMAN. 500, you say?

Mr. CHAMBERS. Yes. In addition to *Brown v. Board of Education*, the legal defense fund represented the Griggs plaintiff. I personally argued over eight cases in the U.S. Supreme Court, including *Albemarle Paper Company v. Moody*, *Swann v. Charlotte-Mecklenburg*, *Thornburgh v. Gingles*, and the recent *Houston Lawyers Association* case that was decided last term.

With great regret, as I think exists among several others who oppose this nominee, I urge you to reject this nomination and to advise the President that Judge Thomas, based on the evidence produced at these hearings, does not meet the standards for elevation to the U.S. Supreme Court.

In summary, my reasons are: first, that the nominee, with no articulated or supportable constitutional or judicial standards would reject much of what this country has done to ensure that African-Americans and other disadvantaged people will have an equal chance in life. This position, as I will develop, is based on the writings and speeches of the nominee as well as my own personal experience.

Second, even if we accept the nominee's recantations or explanations offered during these hearings, the committee and the Senate are left with a candidate who cannot possibly demonstrate qualifications or judicial attributes to serve on our highest Court.

For more than 50 years, the legal defense fund has appealed to the judicial system to ensure improved opportunities for minorities and disadvantaged Americans. We have had marked success and have convinced minorities that, despite its flaws, the Court offers a reasonably fair and peaceful means for seeking equality. We have raised hopes among African-Americans and others that whatever their grievances, they can be fairly or sympathetically heard and addressed in our judicial system. But these accomplishments and the progress we have made would be seriously threatened by Judge Thomas' elevation to the Supreme Court. He threatens and would challenge the precedents established in the Court and in Congress in practically every area of concern to us.

For example, in voting rights, he questions the effects test, established by Congress in 1972 and approved by the Court in *Thornburgh v. Gingles*. He questions the affirmative obligations imposed by the Court in *Green v. New Kent County* and *Swann v. Charlotte-*

*Mecklenburg*, which I argued, for school districts to disestablish the vestiges of past discrimination.

He has soundly criticized litigation such as class action lawsuits designed to bring about remedies to address systemic discrimination. He has problems with group or affirmative obligations established to ensure equal opportunities for minorities in the workplace.

Since *Brown*, the Court and Congress have tried to develop fair and effective means to make real *Brown's* promise of equality. The civil rights remedies that exist today are the product of experience drawn from a wide array of efforts, some successful and some which have not been.

For example, we have tried voluntary efforts like freedom of choice, broad prohibitions as in the voting rights area, and threatened damages as are available under the 1866 Civil Rights Act.

Whatever steps were finally taken have come only after careful analysis of the facts, the law, and proven experience. Judge Thomas would discard all of this.

Second, if we accept the nominee's statements during this hearing at face value, the Senate and the committee would be left with the fact that we have nothing here to determine whether the nominee has the qualifications, the judicial temperament to serve on the Supreme Court. We have prepared an exhibit, an appendix A to our submitted testimony, and I would like to call your attention to it because it lists the 48 Supreme Court Justices who were appointed during the 20th century.

In every instance here, the nominees possessed at least two major qualifications to serve on the Supreme Court. Judge Thomas possesses not one of those. We think when you make your comparison with this list with the qualifications that Judge Thomas has presented, you too would agree that this nominee simply does not have the qualifications to be elevated to the U.S. Supreme Court.

Thank you.

The CHAIRMAN. Thank you very much.

Mr. Rauh.

#### STATEMENT OF JOSEPH L. RAUH, JR.

Mr. RAUH. I testify this afternoon for organizations of people devoted body and soul to the Bill of Rights. But I also testify for myself.

I had the honor and privilege to serve as last law clerk to Justice Benjamin Cardozo and first law clerk to Felix Frankfurter, the two great successors to the legendary Oliver Wendell Holmes. When Senator Kennedy read Clarence Thomas' trashing of Oliver Wendell Holmes last week, I was made ill. I felt not only Holmes but Cardozo and Frankfurter, his great successors, were being trashed as well.

The years I spent with the Court in the 1930's were years when Presidents reached out for the best person. Republican conservative President Calvin Coolidge appointed Justice Harlan Fiske Stone, a great Justice and ultimately the Chief Justice. His successor, Republican conservative President Hoover appointed Justice Cardozo

even though that meant two Jews and three New Yorkers on the Court and knowing how liberal he was.

The importance of that minority cannot be understated. What happened was that the Brandeis-Stone-Cardozo minority on the anti-New Deal Court saved the New Deal and the system under which we lived by two things. One, they educated the public and two, they restrained the majority.

There is no such minority now. You have no such persons who are going to restrain the Court or are going to educate the public to what is wrong with the present system. Now, that was a time when the Presidents reached for the best.

President Bush has suggested, and I quote, that he has appointed "the best person for the job." Why, he didn't even look for the best person. They took the sitting judges and decided which one is best for what we believe in—no abortion, no affirmative action, school prayer, defendants' rights. This was a question of starting with sitting judges and looking for those who would carry out their position. There is no distinction in this man. How he can be called the best person for the job when there is no distinction in anything he has written that has been shown to us.

He has the lowest rating—not only the performance in the appendix just offered the committee, but he has the lowest rating from the American Bar Association of any nominee. There have only been two that had unqualified votes. But Thomas, he not only had unqualified votes, he didn't have a single well-qualified vote. How could the President of the United States tell the people that this is the best person for the job when he can't get 1 of 15 conservative lawyers to say he is well qualified?

Even Carswell had a better record. Thomas has a worse record than even Carswell. I can't see how the Senate can confirm somebody who has a worse record, a worse evaluation than Carswell.

And the hearing. The hearing is quite remarkable. The testimony is inconsistent, incredible, and inoperative. It was inconsistent. You all heard the number of inconsistencies, but probably the basic one is the inconsistency of testifying about dozens of cases that are going to come before the Court and refusing to say where *Roe v. Wade* stood. It is incredible. The idea that he has never discussed with anyone *Roe v. Wade*—well, the word is incredible. I think there are better odds on the existence of the tooth fairy than the truth of that statement that he never considered or discussed *Roe v. Wade*.

Finally, it is inoperative. What he said is everything he has said in life up to the time he went on the court is inoperative because he was doing policy for the administration. Well, I think whichever way you look at that, it is very, very damning.

Well, in the 5 minutes—they are almost up—I only have this final appeal to the committee. Don't approve this man. He will do what he said he was going to do. He believes in the things—the conversion at the hearing here is no answer for you. The last two have done exactly what they said they were going to do on the Court, and what we argued they shouldn't be on the Court for, because they would do just what they said. And this man will, too.

Finally, you are the keeper now of the Bill of Rights. There is a majority of the Court which is very prone to having an erosion of

the Bill of Rights. Don't add one more. Don't take the historic voice out of this country. The Supreme Court has been the greatest protector of the Bill of Rights in America. Don't take the last shot here to complete the transition from the voice of liberty to now the silence on the Bill of Rights.

Thank you, sir.

The CHAIRMAN. Thank you very much, Mr. Rauh.

Ms. Hernandez, welcome back.

#### STATEMENT OF ANTONIA HERNANDEZ

Ms. HERNANDEZ. Thank you, and thank you for giving me the privilege to testify before you today. Not only do I represent the Mexican-American Legal Defense Fund, but today I also represent the Alliance for Justice, a coalition that represents legal, not-for-profit organizations concerned with the administration of justice. The alliance monitors judicial nominees and issues pertaining to the Court.

Because of the Nation's history of discrimination against Hispanics and because of the U.S. Supreme Court's unique role for more than 30 years in vindicating the civil and constitutional rights of Hispanics, we Hispanics have placed a particular reliance on the Supreme Court in assuring our civil and constitutional rights. Whether the Supreme Court's decision in 1989, hostile to the civil and constitutional rights of Hispanics, actually signals a Supreme Court retrenchment or turning back the clock, I have little doubt that the next person confirmed as an Associate Justice on the Supreme Court will, in fact, have a major impact on the future course of Supreme Court adjudications.

The reason for this determinative impact is obvious. The next nominee confirmed by the Senate will be replacing Justice Thurgood Marshall, whose fairness and compassion for civil and constitutional rights were crucial to the rights of Hispanics.

We have in our written document outlined the various reasons for our opposition. What I will do with my time is concentrate on two. The first matter deals with Judge Thomas' view of the equal protection clause and its impact on our community, which is an issue that I don't believe has been quite explored or discussed here today.

In reviewing Clarence Thomas' legal views on equal protection in the context of school desegregation and segregation, it reveals his preference to abandon the 14th amendment equal protection clause and substitute instead his views of the 14th amendment's privilege or immunities clause as paramount. Regardless of what freedoms Judge Thomas might find to be encompassed within the privilege and immunities clause, the fact of the matter is that his preferred privilege or immunity clause only protects citizens, whereas the equal protection clause protects any person.

As you know, within the Hispanic community, a large portion of our community are legal resident aliens, and a substantial percentage of our community are undocumented aliens. Some of the rights given by the Court—and let me go further. Since the privilege or immunities clause cannot and does not protect noncitizens, Judge Thomas may very likely reject the Supreme Court's historical ap-

plication of the equal protection doctrine to protect noncitizens in cases running from *Yick Ho v. Hopkins* back in 1886, a San Francisco ordinance invalidating a San Francisco ordinance that outlawed Chinese laundries and declared that it violated the equal protection clause, and also overrule *Doe v. Plyler*, which is a case involving a Texas law that denied education to undocumented children.

In fact, had Judge Thomas rather than Judge Marshall been on the Supreme Court at the time of *Plyler*, and had Judge Thomas rejected the equal protection analysis in favor of his privileges or immunities approach, MALDEF's 5-4 victory would have been a 5-4 loss.

Now, I would like to deal with the testimony of Judge Thomas and his 5 days and statements that he made. Apparently recognizing that many of the philosophical positions that he has taken in his speeches and his writings were out of the mainstream, Clarence Thomas appeared to pursue at least four strategies in his 5 days of testimony before this committee.

First, he occasionally reiterated and tried to defend several of his previously stated philosophical views, particularly his opposition to virtually all forms of affirmative action as unlawful and unconstitutional. Second, he tried to modify and, in fact, to moderate some of his most extreme views.

Third, he refused to answer questions in a few areas altogether, particularly with regard to whether he would overrule the constitutional right to reproductive freedom. And finally and most sweepingly, he argued that his past philosophical positions should be deemed irrelevant to the confirmation process because they were arrived at and presented when he was a policymaker rather than in his current role as an impartial judge. This position lacks substance and credibility.

Finally, in conclusion, presenting MALDEF's position in opposition to the confirmation of Clarence Thomas is not a task that I had looked forward to at all. I know Clarence Thomas; I consider him a friend. And as other witnesses have brought to the attention of this committee, there is no question that he has many positive qualities.

Additionally, on matters of importance to Hispanics, there similarly is no question that during his tenure at EEOC, he was accessible to me and I have gotten to know him then in trying to deal with him on the many matters that EEOC dealt with. He was sensitive to our concerns and we did discuss that.

He also was sensitive in supporting Spanish language forms and brochures, and commendable here was his testimony in response to Senator DeConcini about his opposition to English only. Nevertheless, in determining our position here, we at MALDEF had to look at the entire picture in the context of a Supreme Court nomination and we, in particular, had to look closely indeed at Judge Thomas' legal and philosophical views about the civil rights and constitutional provisions and about Supreme Court decisions interpreting them, all of such importance to protecting and advancing the rights of Hispanics. The big picture we found was not all very positive.

Based on his widely expressed legal and constitutional views which are summarized herein, we reached the inescapable conclusion that Judge Thomas should not be on the Supreme Court. We accordingly urge the Senate to exercise its coequal role in the process by not confirming Judge Thomas as an Associate Justice to the Supreme Court.

Thank you.

[The prepared statement of Ms. Hernandez follows:]

STATEMENT

On Behalf Of The

MEXICAN AMERICAN LEGAL DEFENSE  
AND EDUCATIONAL FUND  
(“MALDEF”)

By

ANTONIA HERNANDEZ  
PRESIDENT AND GENERAL COUNSEL

Before The

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

IN OPPOSITION TO THE  
CONFIRMATION OF CLARENCE THOMAS  
AS AN ASSOCIATE JUSTICE OF THE  
UNITED STATES SUPREME COURT

102nd CONGRESS  
1st SESSION  
September 19, 1991

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STATEMENT OF ANTONIA HERNANDEZ

I am Antonia Hernandez, the President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). This Statement is submitted on behalf of MALDEF in opposition to Senate confirmation of Clarence Thomas as an Associate Justice of the United States Supreme Court.

In this Statement, I address hereafter three primary matters: (1) the background of MALDEF's position on Clarence Thomas; (2) Judge Thomas' writings and speeches antagonistic to civil rights laws and constitutional provisions which protect the rights of Hispanics; and (3) Judge Thomas' testimony before this Committee.

**I. The Background of MALDEF's Position on Judge Thomas**

Because of our nation's history of invidious discrimination against Hispanics, and because of the United States Supreme Court's unique role for more than thirty years (1954-1988) in beginning to vindicate the civil and constitutional rights of Hispanics, we Hispanics have placed particular reliance on the Supreme Court in assuring our civil and constitutional rights.

The history of discrimination against Hispanics in this country, particularly in the Southwest and especially from the mid-Nineteenth Century to date,<sup>1</sup> has been similar to

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<sup>1</sup> This nation's discrimination against Hispanics dates back at least to the period following the 1848 Treaty of Guadalupe-Hidalgo, through which Mexico ceded to the United States territory which would become the states of Arizona, California, Colorado, New Mexico, and Texas, and which would become parts of Nevada and Utah. Article IX of that Treaty guaranteed all persons of Mexican origin continuing to reside in that territory not only United States citizenship but also "the enjoyment of all the rights of the citizens of the United States according to the principles of the Constitution," including of course "free enjoyment of their

that experienced by African Americans. We Hispanics have been subjected to segregation in schools, in restaurants, and in hotels. We have been denied the opportunity to serve on juries. We have been, and still are, denied employment, and often treated badly when employed. And we have even been, and still are, denied the most fundamental of rights, the right to vote for representatives of our choice.

But we Hispanics, like African Americans in our country, were finally given hope in 1954 by the United States Supreme Court. In fact, two weeks prior to the Supreme Court's unanimous ruling in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (holding school segregation unconstitutional), the Supreme Court in Hernandez v. Texas, 347 U.S. 475 (1954), unanimously decided that Mexican Americans were protected by the Fourteenth Amendment, and unanimously held that the exclusion of Mexican Americans from juries in Texas violated the Fourteenth Amendment's equal protection clause. In subsequent years, it again was the Supreme Court -- and thereafter also Congress -- that continued to recognize some of our basic civil rights.

This fight to establish our basic civil and constitutional rights has not been an easy one. It in fact has required MALDEF attorneys to file and to litigate hundreds of lawsuits. And a number of our lawsuits have ended up in the United States Supreme Court.

A prime example is the voting rights case of White v. Regester, 412 U.S. 755 (1973). In this case, a unanimous Supreme Court struck down Texas' imposition of a multimember legislative district in Bexar County, a heavily Hispanic county where San

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liberty and property." Despite these guarantees, what the once-Mexican population received instead was more than a century of subjugation.

Antonio is located. Based on such facts as the reality that only five Hispanics in nearly 100 years had ever been elected to the Texas Legislature from Bexar County, the Supreme Court upheld our claim that the multimember district diluted the votes of Hispanics in violation of the Fourteenth Amendment, and the Court thus affirmed the remedial redrawing of single-member districts.

Apart from the Supreme Court's decision in White and its earlier decision in Hernandez, few of our victories have been the result of unanimous decisions by the Supreme Court. Instead -- and increasingly in the 1980s -- we faced a divided Supreme Court, a Court which in fact often was very closely divided on issues of special importance to Hispanics.

For example, in Plyler v. Doe, 457 U.S. 202 (1982), we challenged Texas' denial of a free public school education to undocumented Hispanic children. These children were Texas residents most of whom would eventually become legal residents, but who, without an education, would become a permanent underclass. The Supreme Court in this case agreed that Texas' policy was unconstitutionally discriminatory in violation of the Fourteenth Amendment. But the Court reached this decision through a bare 5-4 majority, with Justices Thurgood Marshall and Lewis Powell joining the majority decision written by Justice William Brennan.

Following the resignation of Justice Powell and his replacement by Justice Anthony Kennedy, the Supreme Court -- within a matter of weeks in June, 1989 -- rendered, usually on five-to-four votes, a series of decisions devastating to the rights of Hispanics, other minorities, and women to a discrimination-free workplace. These

decisions<sup>2</sup> are, of course, well known to the United States Senate given the vast amount of time that the Senate had to expend last year to try to restore prior law through the Civil Rights Act of 1990 (S. 2104), legislation passed by the Senate on a lopsided vote,<sup>3</sup> only to be vetoed by the President, and with the Senate thereafter falling only one vote short of a veto override. In the meantime, the effect upon Hispanics of these recent Supreme Court decisions has been particularly devastating in view of increased discrimination against Hispanics, which was revealed by a recent government study showing that as many as 19% of all employers are now engaging in discrimination against "foreign-looking" or "foreign-sounding" employees and job applicants.<sup>4</sup>

Whether the Supreme Court's decisions in 1989 hostile to the civil and constitutional rights of Hispanics actually signal a Supreme Court retrenchment or turning-back-of-the-clock on civil rights, I have little doubt that the next person confirmed

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<sup>2</sup> These decisions, listed roughly in chronological order, include the following: Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (reallocating burdens of proof and redefining business necessity, among other things, in Title VII disparate impact cases); Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (permitting "reverse discrimination" collateral attacks on consent decrees at any time); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989) (striking down EEOC charges as untimely under Title VII when filed shortly after the discrimination affected the female charging parties); Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (eviscerating § 1981 by limiting it to intentional discrimination only in the formation of contracts); Jett v. Dallas Independent School District, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (further eviscerating § 1981 in the public sector by subjecting it to the "policymaker" constraints governing § 1983 lawsuits); Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S. Ct. 2732, 105 L.Ed.2d 639 (1989) (disallowing statutory attorneys fees to successful Title VII plaintiffs who had to litigate for years against an intervening defendant's attack on their back pay and seniority remedies); cf. Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989) (insulating discriminatory benefit plans from age discrimination challenges under the ADEA).

<sup>3</sup> Virtually identical legislation, H.R. 4000, was passed by the House by a similarly lopsided vote of 272-154.

<sup>4</sup> United States General Accounting Office, GAO Report to the Congress: Employer Sanctions and the Question of Discrimination, 5-7, 37-79 (March, 1990).

as an Associate Justice on the Supreme Court will in fact have a major impact upon the future course of Supreme Court adjudication: either at least occasionally respecting and vindicating the civil and constitutional rights of Hispanics, or denying our rights altogether.

The reason for this determinative impact is obvious. The next nominee confirmed by the Senate will be replacing Justice Thurgood Marshall, whose fairness and compassion for civil and constitutional rights were crucial to the rights of Hispanics.

With Justice Marshall no longer on the Supreme Court, and with the future of the Supreme Court hanging in the balance, I am of course concerned about his possible replacement, and I am particularly concerned about the legal philosophy of the person nominated to succeed Justice Marshall.

## II. Judge Thomas' Writings and Speeches Antagonistic to Civil and Constitutional Rights

MALDEF has historically and consistently sought (quite successfully) to protect and to advance the civil and constitutional rights of Hispanics through litigation and advocacy: (a) by winning voluntarily-adopted and court-ordered goals and timetables and other forms of affirmative action in employment; (b) by defending set-aside programs in government contracting for minority business enterprises; (c) by urging increased inclusion of Hispanics in higher education through effective affirmative action programs; (d) by obtaining and now maintaining effective school desegregation remedies; (e) by making the Fourteenth Amendment's equal protection clause meaningful for noncitizens

and particularly for undocumented children; and (f) by trying to hold on to (especially for economically disadvantaged Latinas) the constitutional right to reproductive choice and indeed to privacy itself.

Through his lengthy paper trail of extrajudicial writings and speeches on civil and constitutional rights, Judge Clarence Thomas has revealed an ideological conservatism which differs little from that of Judge Robert Bork,<sup>5</sup> and, of great importance to us, solid philosophical positions in virtually all six of the foregoing areas. And in virtually all such areas of great concern to Hispanics, Judge Thomas' positions are diametrically opposed (or, possibly in the latter two instances, only potentially diametrically opposed) to the positions which have been and continue to be advanced by MALDEF on behalf of the civil and constitutional rights of Hispanics.

#### A. Affirmative Action in Employment

One of the most frequently-repeated themes in Clarence Thomas' writings and speeches is his steadfast opposition to affirmative action in virtually all forms, including affirmative action ordered by the courts to remedy proven past discrimination.

Clarence Thomas' opposition to affirmative action is based on his belief that the Constitution must in all circumstances be colorblind:

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<sup>5</sup> Judge Thomas' ideological conservatism, as is explored more thoroughly infra at 6-24, has frequently been compared with that of Judge Robert Bork particularly with regard to their mutual opposition to Twentieth Century jurisprudence on affirmative action, on school desegregation, and on the Ninth Amendment right to privacy. Given their mutual views, it may not be surprising that Judge Thomas believes to be "disgraceful" the fact "that Judge Bork is not now Justice Bork." Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, 391,392 (Cato Institute, 1988) (cited hereafter as Assessing the Years).

"I firmly insist that the Constitution be interpreted in a colorblind fashion. It is futile to talk of a colorblind society unless this constitutional principle is first established. Hence, I emphasize black self-help, as opposed to racial quotas and other race-conscious legal devices that only further and deepen the original problem."<sup>6</sup>

Judge Thomas' views of affirmative action under Title VII of the Civil Rights Act of 1964, and of employment discrimination law in general, are the same as his view of a colorblind Constitution:

"I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals -- both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries."<sup>7</sup>

Stated otherwise, in Judge Thomas' view, Title VII in fact makes affirmative action unlawful. Although Title VII bars "employers from discriminating on the basis of race,

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<sup>6</sup> Thomas, Letter to the Editor, Wall Street Journal, 23 (Feb. 20, 1987). See also, e.g., Thomas, "The Black Experience: Rage and Reality," Wall Street Journal (Oct. 12, 1987). "Much of the current thinking on civil rights has been crippled by the confusion between a 'colorblind society' and a 'colorblind Constitution.' The Constitution, by protecting the rights of individuals, is colorblind."

<sup>7</sup> Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough?," 5 Yale Law & Policy Review 402, 403 n. 3 (1987) (emphasis added) (cited hereafter as Yale Policy Review).

color, sex, religion, or national origin,"

"Unfortunately, this commitment to nondiscrimination soon gave way to a system of group preferences.

"The government encouraged and required employers to institute the very practices that sponsors of the civil rights law had observed 'are themselves discriminatory.'"<sup>8</sup>

Accordingly, "group preferences" in any form "conflict with the law."<sup>9</sup>

Given Judge Thomas' personal opposition to affirmative action, as well as his above-illustrated legal views, it may not come as a surprise that he has formally criticized as wrongly decided most of the Supreme Court's decisions approving various forms of affirmative action. The most "egregious example," according to Judge Thomas, is the Supreme Court's Weber decision in 1979 approving voluntary affirmative action.<sup>10</sup> Also worthy of his "personal disagreement with the Court" are four decisions on affirmative action rendered in 1986 and 1987.<sup>11</sup>

Because all of these five decisions were rendered by the Supreme Court usually on

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<sup>8</sup> Thomas, "Abandon the Rules; They Cause Injustice," USA Today (Sept. 15, 1982).

<sup>9</sup> Id. In a subsequent commentary, Clarence Thomas argued that the Supreme Court's contrary view of the law, as set forth in its decisions upholding various forms of affirmative action as lawful under Title VII, reflected the "politicization" of the Court:

"Let us look once more at the Civil Rights Act of 1964 as an example of the way this process has worked. We note that Congress passed a general law in relatively clear language. Subsequently, though, as in the case of Title VII of the act, the law was interpreted in a very different way."

Thomas, Assessing the Years, 395.

<sup>10</sup> Thomas, Assessing the Years, 395.

<sup>11</sup> Thomas, Yale Policy Review, 403 & 402 n. 2.

very close votes, and because Judge Thomas' vote (in place of Justice Thurgood Marshall's vote) would have caused a contrary result in several of the cases and could in the future cause a reversal of all of the cases, we briefly summarize below the five decisions with which Clarence Thomas has to date voiced his personal disagreement:

- >> United Steelworkers of America v. Weber, 443 U.S. 193 (1979). On a 5-3 vote, the Court upheld as lawful under Title VII a private employer's hiring and training program which reserved half of the skilled-craft jobs for Blacks. The Court specifically noted that the program was designed to remedy the severe underrepresentation of Blacks in the employer's workforce in a manner that is consistent with the objectives of Title VII, and that the program was temporary and did not unnecessarily trammel the interests of white employees.
- >> Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986). On a 5-4 vote, the Court upheld as appropriate relief under Title VII -- in order to remedy "egregious" and longstanding past discrimination by the defendant trade union -- a 29% minority membership and employment goal to be achieved by 1987 or soon thereafter. In reaching this decision, the Court expressly rejected the argument made by the federal government<sup>12</sup> that Title VII remedies could benefit only identifiable victims of the

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<sup>12</sup> Despite the title of this case -- seemingly the EEOC (and the Justice Department) against a discriminatory construction trade union -- neither the EEOC nor the Justice Department supported the numerical remedy in this case. As is set forth in their Brief for the United States in this case, the EEOC (then chaired by Clarence Thomas) and the Justice Department in fact opposed the numerical remedy. Support for the numerical remedy was provided instead by two other plaintiffs in the case (the State of New York and the City of New York) and by a host of civil rights organizations.

longstanding past discrimination.

>> Local 93, Firefighters v. Cleveland, 478 U.S. 501 (1986). On a 6-3 vote, the Court upheld as lawful under Title VII a consent decree (per usual not containing an admission of past discrimination) requiring specified promotions of minority employees to remedy historical underrepresentation. This, the Court observed, is consistent with Congress' strong preference for voluntary settlements of Title VII claims.

>> United States v. Paradise, 480 U.S. 149 (1987). On a 5-4 vote, the Court upheld as constitutional under the Fourteenth Amendment's equal protection clause a court order requiring one-for-one (one Black for every white) promotions for state troopers to remedy pervasive past discrimination by the defendant law enforcement agency.

>> Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987). On a 6-3 vote, the Court upheld as lawful under Title VII a voluntary affirmative action plan pursuant to which a female was given a preference for promotion over an equally qualified male so as to desegregate a job classification historically filled only by males. As in Weber, the Court again noted that this plan was consistent with Congress' objectives in enacting Title VII.

The continued viability of each of these decisions, among others, as well as the future of affirmative action in general, hang in the balance today.

### B. Set-Aside Programs in Government Contracting

Similar to his disagreement with the Supreme Court's decisions approving affirmative action in employment is Clarence Thomas' criticism of the Supreme Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980), in which the Court upheld as constitutional a federal public works program which set aside 10% of the federal contracts for minority business enterprises (MBEs). Disagreeing with this decision, Judge Thomas claimed that the Supreme Court "reinterpret[ed] civil rights laws to create schemes of racial preference where none was ever contemplated."<sup>13</sup>

Nevertheless aware that Congress not only contemplated the MBE set-aside program but in fact enacted it, Judge Thomas aimed his criticism at Congress as well. In the same commentary quoted from above, Judge Thomas, after lambasting the Supreme Court, stated:

"Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside law the Court upheld in Fullilove v. Klutznick?"<sup>14</sup>

Unfortunately -- from the perspective of MALDEF and of other civil rights organizations -- the constitutionality of federal MBE programs, now a matter of settled law, may be revisited by a newly configured Supreme Court. Fullilove, a 1980 decision, was decided on a 6-3 vote. A decade later, in Metro Broadcasting, Inc. v. FCC, 497 U.S.

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<sup>13</sup> Thomas, Assessing the Years, 396 (brackets added).

<sup>14</sup> Id.

\_\_\_, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), the Court upheld as constitutional the FCC's minority preference policies in granting new broadcast licenses and in distress sales of broadcast licenses, but this decision was rendered on a narrow 5-4 vote.<sup>15</sup>

A new Justice personally and philosophically opposed to affirmative action, such as Clarence Thomas, could very well tip the balance to form a new Supreme Court majority not only willing to strike down future federal programs but also willing to overrule cases such as Fullilove and Metro Broadcasting.

### C. Inclusion and Diversity in Higher Education

In the Supreme Court's seminal decision on the legality and constitutionality of race-conscious affirmative action, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), a case involving the Davis Medical School's policy of reserving 16 of its 100 admission slots for minority students, the Court ruled 5-4 that the rigid reservation of 16 seats was impermissible without a showing that the school was remedying its own past discrimination, but that reliance on race or ethnic origin as an important factor in the admissions process was legally and constitutionally permissible in view of the interest of institutions of higher education in attaining diverse student bodies.

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<sup>15</sup> One year earlier, a 6-3 majority of the Supreme Court in City of Richmond v. Croson, 488 U.S. 469 (1989), struck down Richmond's MBE set-aside program as unconstitutional under the Fourteenth Amendment. The majority reached this result by applying the rigorous strict-scrutiny standard of review to the set-aside program, by ruling that state and local governments could enact such programs only if they are narrowly tailored to remedying identifiable past discrimination, and by distinguishing Fullilove based on the greater deference given by the Court to Congress.

In Metro Broadcasting, the four dissenters -- Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy -- argued that the same strict-scrutiny standard of review should be applied to Congress' enactments, and that Congress' approval of the FCC minority preference policies thereby should be struck down as unconstitutional.

Although Clarence Thomas has not widely criticized the Supreme Court's majority decision in Bakke -- at least possibly because he was a beneficiary of the race-conscious admissions program at Yale Law School<sup>16</sup> -- the Bakke ruling does not fit within his legal philosophy compelling the Constitution to be colorblind. Although not widely, Judge Thomas thus necessarily has criticized the Court's ruling in Bakke.

In Judge Thomas' commentary quoted from frequently above, in which he initially noted that it "is easy enough to blame the Court for 'voodoo jurisprudence,'" <sup>17</sup> Judge Thomas essentially argued that -- at least since Brown v. Board of Education, 347 U.S. 483 (1954), if not also in Brown itself -- the Supreme Court and then the lower courts wrongfully moved from their intended judicial role of statutory and constitutional interpretation to an improper role of political and social policymaking; and Judge Thomas then sought to illustrate this alleged move into policymaking through reference to four decisions with which he disagreed: Bakke and three other affirmative action

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<sup>16</sup> As described in the opening paragraphs of a recent article in The New York Times, 1 (July 14, 1991):

"Judge Clarence Thomas, who came to prominence as a fierce black critic of racial preference programs, was admitted to Yale Law School under an explicit affirmative action plan with the goal of having blacks and other minority members make up about 10 percent of the entering class, university officials said.

"Under the program, which was adopted in 1971, the year Judge Thomas applied, blacks and some Hispanic applicants were evaluated differently than whites, the officials said. Nonetheless, they were not admitted unless they met standards devised to predict they could succeed at the highly competitive school."

This apparently was not the first time that Judge Thomas had benefitted from affirmative action, as years earlier he reportedly had won "a race-based scholarship to attend college." Los Angeles Daily Journal, 1 (July 16, 1991).

<sup>17</sup> Thomas, Assessing the Years, 392. Judge Thomas concluded this sentence as follows: "but Congress must share a great deal of the blame." Id.

cases.<sup>18</sup> Specifically with regard to its purported policymaking role on affirmative action: "The Court has made rather creative interpretations of equal protection and legislative intent in a number of civil rights cases beginning with Regents of the University of California v. Bakke."<sup>19</sup>

Although Bakke today seems to have been so correctly decided that it is a component part of the fabric of American law, it is at least possible that Bakke could be revisited by a newly configured, activist, anti-affirmative-action Supreme Court. In addition, it is a virtual certainty that the Court within only a few more years will review the legality and constitutionality of race- and ethnic-conscious scholarships for minorities. These are matters which we would not want constitutionally colorblind Clarence Thomas to be able to rule on.

#### D. School Desegregation Remedies

Any review of Clarence Thomas' legal position on school desegregation should

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<sup>18</sup> In his analysis leading to his use of Bakke as an illustration of wrongful political and social policymaking, Judge Thomas stated, in relevant part:

"There is no question that courts have entered the policymaking process in an important way. But the founders purposely insulated the courts from popular pressures, on the assumption that they should not make policy decisions.

• • •

"When political decisions have been made by judges, they have lacked the moral authority of the majority.

• • •

"When they [the courts] have made important political and social decisions in the absence of majority support, they have only exacerbated the controversies they have pronounced on.

• • •

"The dignity of the judiciary is not enhanced by its politicization."

[*id.* at 394-95 (brackets added).

<sup>19</sup> *Id.* at 395.

begin with a brief review of the Supreme Court's unanimous decisions in Brown v. Board of Education, 347 U.S. 483 (1954) ("Brown I"), and in Brown v. Board of Education, 349 U.S. 294 (1955) ("Brown II"). This is because Clarence Thomas has criticized not only the remedies for school desegregation but also the basis for the original Brown I decision itself.

In the initial 1954 decision, which was based upon and effectively compelled by a long series of earlier Supreme Court decisions holding that racial segregation in higher education was unconstitutional under the equal protection clause of the Fourteenth Amendment,<sup>20</sup> the Court unanimously ruled: "Separate educational facilities are inherently unequal." Brown I, 347 U.S. at 495. This unanimous ruling unquestionably was based on the equal protection clause of the Fourteenth Amendment.<sup>21</sup>

Following rebriefing and reargument on the issue of remedy, the Court a year later unanimously ruled that the public school systems were required "to effectuate a transition to a racially nondiscriminatory school system" and that this transition was to occur "with all deliberate speed." Brown II, 349 U.S. at 301.

Clarence Thomas' quarrel with Brown I is not with its result but with the grounds on which it was based. Because he firmly believes that African American school children

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<sup>20</sup> See, e.g., McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). See generally Brown I, 347 U.S. at 492.

<sup>21</sup> As stated by the unanimous Supreme Court in Brown I, 347 U.S. at 495:  
 "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

"can do quite well in their own schools,"<sup>22</sup> Judge Thomas disagrees with the equal-protection-of-the-laws premise of Brown I that separate is inherently unequal, and he in fact disagrees with the Supreme Court's reliance in Brown I on the equal protection clause at all.<sup>23</sup>

Instead, according to Judge Thomas, Brown I should have been based on Justice Harlan's constitutional colorblindness dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), which Judge Thomas believes was in turn based primarily on the Fourteenth Amendment's privileges or immunities clause, which Judge Thomas in turn believes incorporates or should incorporate principles of higher law or natural law.<sup>24</sup>

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<sup>22</sup> Williams, "A Question of Fairness." The Atlantic Monthly, 72 (Feb. 1987).

<sup>23</sup> See generally Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63 (1989) (cited hereafter as "Higher Law"); Thomas, "Toward a 'Plain Reading' of the Constitution -- The Declaration of Independence in Constitutional Interpretation," 30 Howard Law Journal 983 (1987) (cited hereafter as "Plain Reading").

As Judge Thomas concluded in another writing, following a reference to Brown I: "The main problem with the Court's opinions in the area of race is that it never had an adequate principle in the great Brown precedent to proceed from." Thomas, Assessing the Years, 392-93.

<sup>24</sup> This sometimes-confusing and often-circular argument is set forth primarily in Thomas, "Higher Law," and Thomas, "Plain Meaning." Although Judge Thomas' reasoning is not entirely clear to us, we nevertheless attempt to summarize his views briefly here by quoting from several of his seemingly most relevant statements.

"Brown v. Board of Education would have had the strength of American political tradition behind it if it had relied upon Justice Harlan's [colorblindness] arguments instead of relying on dubious social science. That case might have been an opportunity to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment."

Thomas, "Higher Law," 68 (brackets added, footnote omitted).

"Justice Harlan's reasoning, as we understand him, provides the best basis for the Court opinions in the Civil Rights [sic] cases from Brown on."

Thomas, "Plain Meaning," 700.

"Our best guide to the purpose behind the Privileges or Immunities Clause of the Fourteenth Amendment is Justice John Marshall Harlan's famous and lone dissent in Plessy v. Ferguson."

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"It is not sufficiently appreciated that Justice Harlan's dissent focused on both the Thirteenth and the entire Fourteenth Amendments --

Among the problems with Clarence Thomas' approach to Brown I and its progeny is the fact that his approach swims against the tide of enormous scholarly research concluding that the equal protection clause is the core of the Fourteenth Amendment. Also problematic are not only his willingness to reject the then-emerging equal protection jurisprudence on which Brown I was based, *see supra* note 21, but also his apparent willingness to reject the legal arguments advanced by all the parties in a case and to legislate his own views instead.

But the primary problem with Clarence Thomas' approach is that it seems to omit the Fourteenth Amendment's equal protection clause entirely from constitutional jurisprudence.

And if there can be no or only a few violations of the equal protection clause, there then can be no or only few remedies therefor. And that seems to be the next step

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*in particular, the 'privileges or immunities of citizens of the United States' clause. Justice Harlan's opinion provides one of our best examples of natural rights or higher law jurisprudence. He brings us back to privileges and immunities by constantly speaking of 'citizens' and then rights. For example, Justice Harlan spoke of segregation as putting the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. That Justice Harlan spoke of 'citizens' rather than 'persons' shows that he relied on the Privileges or Immunities Clause rather than on either the Equal Protection or Due Process Clause, both of which refer to persons. For Justice Harlan, the key to the Civil War amendments was the privileges and immunities of citizens of the United States.*

*"In Justice Harlan's view, the original intention of the framers of the Fourteenth Amendment was to bring about an equality of rights or privileges and immunities exercised by United States citizens."*

Thomas, "Higher Law," 66-67 (footnotes omitted).

*"In order to appreciate the subtleties of Justice Harlan's dissent, one must read it in light of the 'higher law' background of the Constitution. Justice Harlan understood, as did Lincoln, that his task was to bring out the best of the Founders' arguments regarding the universal principles of equality and liberty."*

Thomas, "Plain Meaning," 701.

in Judge Thomas' approach:

"[Fourteen years after Brown I], in the Green v. County Board of Education case, we discovered that Brown not only ended segregation but required school integration. And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education."<sup>25</sup>

In a mere two sentences, Judge Thomas reflected both a serious misunderstanding of school desegregation law and a severe disagreement with that body of law. First, neither Brown I or Brown II "ended segregation" as both were followed by a more-than-decade-long campaign of Massive Resistance. Second, the Supreme Court's remedy of desegregation through integration commenced with Brown II, as pointed out above, and not with Green v. County School Board, 391 U.S. 430 (1968), in which a unanimous Supreme Court merely held freedom-of-choice plans to be inadequate to satisfy the mandate of Brown II in view of the decades upon decades of legally entrenched segregation. Third, Judge Thomas' reference to the beginning of "a disastrous series of cases requiring busing" merely emphasizes his disagreement with Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), in which the Court held that the trial court did not abuse its remedial discretion in requiring redrawn school attendance zones and altered feeder patterns (which in turn required some school buses to travel in different directions) so as to remedy a prolonged pattern of unconstitutional actions.

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<sup>25</sup> Thomas, Assessing the Years, 393 (footnote omitted).

Finally, in view of the fact that Judge Thomas apparently would allow parents who care about a decent education -- all parents care about a decent education -- to trump constitutional rights, he appears to prefer judicial policymaking of his own totally contrary to the neutral constitutional principle reiterated by a unanimous Supreme Court in the Little Rock case: that "constitutional rights ... are not to be sacrificed or yielded" because of opposition to those rights, Cooper v. Aaron, 358 U.S. 1 (1958).

The next generation of school desegregation cases moving toward the Supreme Court involve the issue of when a federal court should relinquish jurisdiction and in effect permit resegregation.<sup>26</sup> There can be little doubt about Judge Thomas' position on this crucial issue.

#### E. Equal Protection for Undocumented Children

The foregoing review of Clarence Thomas' legal views on equal protection in the context of school segregation and desegregation reveals his ideological preference to abandon the Fourteenth Amendment's equal protection clause and to substitute instead his view of the Fourteenth Amendment's privileges or immunities clause (including his concepts of higher law and of natural law) as paramount. See supra note 24 and accompanying text.

Regardless of what freedoms Judge Thomas might find to be encompassed within the privileges or immunities clause, the fact of the matter is that his preferred privileges

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<sup>26</sup> See, e.g., Keyes v. School District No. 1, Denver, 895 F2d 659 (10th Cir. 1990), cert. denied, 498 U.S. \_\_\_, 111 S.Ct. 951, 112 L.Ed.2d 1040 (1991).

or immunities clause protects only "citizens,"<sup>27</sup> whereas the equal protection clause protects "any person."<sup>28</sup>

Since the privileges or immunities clause cannot and does not protect noncitizens, Judge Thomas may very likely reject the Supreme Court's historical application of equal protection doctrine to protect noncitizens<sup>29</sup> in cases running from Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco ordinances effectively outlawing Chinese laundries violate equal protection), to Plyler v. Doe, 457 U.S. 202 (1982) (Texas law which denies a free public education to undocumented children violates equal protection). In fact, had Judge Thomas rather than Justice Thurgood Marshall been on the Supreme Court at the time of Plyler, and had Judge Thomas rejected equal protection analysis in favor of his privileges or immunities approach, MALDEF's 5-4 victory in Plyler would have been a 5-4 loss.

#### F. Privacy and Reproductive Choice

Because at least half of the community we represent is female, and because most Latinas are economically disadvantaged and disproportionately at or below the poverty line, MALDEF for more than a decade has sought to preserve the constitutional right to

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<sup>27</sup> The privileges or immunities clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV § 1 (emphasis added).

<sup>28</sup> The equal protection clause provides in relevant part: "nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1 (ellipsis and emphasis added).

<sup>29</sup> Since Judge Thomas finds it inappropriate to apply the equal protection clause to protect African Americans (for whom the Fourteenth Amendment was primarily designed), it would be difficult indeed, and certainly legally inconsistent, for him to extend the equal protection clause to noncitizens.

reproductive choice. We thus have been most skeptical about Supreme Court nominees who question continuation of the right to choice based on the constitutional right to privacy. Clarence Thomas is such a nominee.

In his "Higher Law" article published in 1989, Judge Thomas introduced his philosophical objection to a Ninth Amendment right to privacy as follows:

"The current case provoking the most protest from conservatives is Roe v. Wade, 410 U.S. 113 (1973), in which the Supreme Court found a woman's decision to end her pregnancy to be part of her unenumerated right to privacy established by Griswold v. Connecticut, 381 U.S. 479 (1965)....

"I elaborate on my misgivings about activist judicial use of the Ninth Amendment in Thomas, 'Civil Rights as a Principle Versus Civil Rights as an Interest,' in Assessing the Reagan Years, 398-99 (D. Boaz ed. 1988)."<sup>30</sup>

In the 1988 publication, Judge Thomas expressed more than just his "misgivings" about the Ninth Amendment right to privacy. He began as follows:

"I cannot resist adding a note here to the recent discussion of the meaning of the Ninth Amendment ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'). It relates directly to our theme of civil rights and

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<sup>30</sup> Thomas, "Higher Law," 63 n. 2 (ellipsis and emphasis added).

the courts. Some senators and scholars are horrified by Judge Bork's dismissal of the Ninth Amendment, as others were horrified by Justice Arthur Goldberg's discovery, or rather invention, of it in Griswold v. Connecticut. But the Ninth Amendment has to be considered in its context at the founding."<sup>31</sup>

Judge Thomas thereupon argued that "the Constitution is a document of limited government," that Supreme Court recognition of any unenumerated right in the Ninth Amendment would "give to the Supreme Court certain powers to strike down legislation," that such power in essence "would seem to be a blank check" for the Court to discover any right and to require "Congress to raise taxes to enforce this right," that accordingly "[m]aximization of rights is perfectly compatible with total government and regulation," and that, therefore, "[f]ar from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom."<sup>32</sup>

Apart from Judge Thomas' "misgivings" about, if not disagreement with, the Supreme Court's "invention" of the Ninth Amendment right to privacy, even more controversial have been his printed remarks on natural law in a speech delivered a year earlier at the Heritage Foundation. In that speech, Judge Thomas quoted approvingly from John Quincy Adams:

"Our political way of life is by the laws of nature, of

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<sup>31</sup> Thomas, Assessing the Years, 398 (emphasis added, footnote omitted).

<sup>32</sup> Id. (brackets added).

nature's God, and of course presupposes the existence of God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government."<sup>33</sup>

He also stated that the "need to reexamine the natural law is as current as last month's issue of Time on ethics," and, most controversially, that "Lewis Lehrman's recent essay in The American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law."<sup>34</sup>

As is set forth in footnote 34 below, the core of Mr. Lehrman's argument is that,

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<sup>33</sup> Thomas, "Why Black Americans Should Look to Conservative Policies," 9 (Heritage Foundation, 1987) (cited hereafter as "Conservative Policies").

<sup>34</sup> Id. at 8. In view of Judge Thomas' endorsement of the essay by Lewis Lehrman, a well known right-to-life activist, it may be worth quoting from that article here:

"May it be reasonably supposed that an expressly stipulated right to life, as set forth in the Declaration [of Independence] and the Constitution, is to be set aside in favor of the conjured right to abortion in Roe v. Wade, a spurious right born exclusively of judicial supremacy with not a single trace of legal authority, implicit or explicit, in the actual text or history of the Constitution itself?

"Are we finally to suppose that the right to life of the child-about-to-be-born -- an inalienable right, the first in the sequence of God-given rights warranted in the Declaration of Independence and also enumerated first among the basic positive rights to life, liberty, and property stipulated in the Fifth and Fourteenth Amendments of the Constitution -- are we, against all reason and American history, to suppose that the right to life as set forth in the American Constitution may be lawfully eviscerated and amended by the Supreme Court of the United States with neither warrant nor amendment directly or indirectly from the American people whatsoever? Is it not a biological necessity, if it were not manifestly plain from the sequence of the actual words in the Declaration and in the constitutional amendments themselves, that liberty is made for life, not life for liberty? Is it to be reasonably supposed that the right to liberty is safe if the right to life is not first secured; and, further, is it to be maintained that human life 'endowed by the Creator' commences in the second or third trimester and not at the very beginning of the child-in-the-womb?"

Lehrman, "The Declaration of Independence and the Right to Life," The American Spectator, 21, 23 (April, 1987) (brackets added, emphasis in the original).

as a matter of natural law, fetuses are entitled to constitutional protection to life from the moment of conception. This argument, if enshrined in law, would justify more than just overruling Roe v. Wade, 410 U.S. 113 (1973), as it would also impose a constitutional prohibition on abortion. States would no longer have even the authority that existed prior to 1973 to permit abortion.

Given Clarence Thomas' hostility to any unenumerated rights in the Ninth Amendment combined with his express endorsement of Mr. Lehrman's essay as "a splendid example of applying natural law," confirmation of Judge Thomas as Justice Thomas could lead not only to the elimination of the constitutional right to reproductive choice but also to the elimination altogether of the constitutional right to privacy.

### III. Judge Thomas' Testimony Before This Committee

Apparently recognizing that many of the philosophical positions that he had taken in his speeches and his writings were not only out of the mainstream but often extreme, Clarence Thomas appeared to pursue at least four strategies in his five days of testimony before this Committee: first, he occasionally reiterated and tried to defend several of his previously-stated philosophical views (particularly his opposition to virtually all forms of affirmative action as unlawful and unconstitutional); second, he tried to modify and in fact to moderate some of his most extreme views; third, he refused to answer questions in a few areas altogether (particularly with regard to whether he would overrule the constitutional right to reproductive choice); and, finally, and most sweepingly, he argued that his past philosophical positions should be deemed irrelevant to the confirmation

process because they were arrived at and presented when he was a policy maker rather than in his current role as an "impartial" judge. To at least several and maybe to many Members of this Committee, parts of Clarence Thomas' testimony accordingly bordered on being unbelievable.

Most problematic to me is Judge Thomas' argument that his past philosophical views should now be disregarded. That is an argument which itself must be disregarded. Because his past philosophical views were freely arrived at by Clarence Thomas, because those views were voluntarily delivered in speeches and voluntarily presented in numerous writings, because those views form at least part of the reason he was nominated in the first place, and because no nominee can or is expected to shed his or her philosophical views upon nomination to the judiciary, Clarence Thomas' past philosophical views are of crucial importance to the determination of whether he should be confirmed by the Senate. And it is precisely because of his widely-expressed past philosophical views that we urge the Senate not to confirm Clarence Thomas.

A. One area in which Judge Thomas did not alter his views in his testimony before this Committee concerns his widely expressed legal view that race-based or gender-based affirmative action goals, timetables, or preferences of any kind in employment are unlawful and unconstitutional. Although he maintained this legal position at the outset of his testimony under questioning by Senator Spector (on Wednesday, September 11), he sort of conceded in response to questioning by Senator Spector and by Chairman Biden (on Friday, September 13) that such policies might sometimes be okay, but only from a policy viewpoint; Judge Thomas declined to give even tentative

approval in a legal context. His consistent speeches and writings, of course, leave no doubt about Judge Thomas' position from a legal viewpoint.

Supreme Court adjudication in this area hangs in the balance today. Judge Thomas should not be confirmed.

B. In the area of congressionally-enacted MBE set-aside programs and similar federal programs, Judge Thomas here too did not alter his prior views about the unconstitutionality of such programs. Although he agreed in his testimony (on Monday, September 16) that the Supreme Court, in such decisions as Metro Broadcasting, has accorded more deference to Congress than it has to the states in this area, Judge Thomas declined to state his legal view. But his legal philosophy here is also well known from his speeches and writings.

Given that Metro Broadcasting was decided barely more than a year ago on a 5-4 vote with Justice Marshall in the majority, Supreme Court adjudication in this area also hangs in the balance today. Judge Thomas should not be confirmed.

C. On the matters of inclusion and diversity in higher education, Judge Thomas only slightly altered his previously-expressed legal criticism of the Supreme Court's approval of race- and ethnic-based affirmative action programs. As a beneficiary of such a program at Yale Law School, he conceded under questioning by Senator Brown (on Wednesday, September 11) and by Senator Kennedy (on Thursday, September 12) his approval of Yale's affirmative action program, but again only from a policy perspective, not from a legal viewpoint. And, under questioning by Senator Simon (on Wednesday, September 11), Judge Thomas similarly voiced approval of race- and ethnic-

based scholarships, but only from a policy perspective, not from a legal perspective. His legal philosophy opposing all forms preference, again, are well known.

Given that Bakke was a 4-1-4 decision rendered in 1978 -- with Justices Marshall, Brennan, and Powell casting key votes -- the legality and constitutionality of inclusive affirmative action plans in higher education, and even of essential race- and ethnic-based scholarships, may hang in the balance today. Judge Thomas should not be confirmed.

D. As to his legal views on school desegregation remedies, Judge Thomas somewhat expanded upon his previous criticism of several Supreme Court decisions by stating to Senator Specter (on Monday, September 16) that the remedies must be related to improving the quality of education, thereby at least implying that he continues to oppose such desegregation remedies as integrating students and integrating faculty as a bottom-line principle of having not African American schools, Hispanic schools, and Anglo schools, but just schools.

Resegregation issues are currently pending before the Supreme Court, and cases presenting similar issues will be reviewed hereafter. Judge Thomas should not be confirmed.

E. As far as I'm aware, Judge Thomas was not asked about and did not testify about his stated preference for the privileges or immunities clause, rather than the equal protection clause, as the "core" of the Fourteenth Amendment's guarantee of equality under law. Because the privileges or immunities clause applies only to "citizens," whereas the equal protection clause protects "any person," his preferred approach to Fourteenth Amendment decision-making is especially troubling to me.

Fourteenth Amendment cases involving discrimination against noncitizens come before the Supreme Court quite frequently. Again, Judge Thomas should not be confirmed.

F. Finally, on the issue of reproductive choice, Judge Thomas during his testimony repeatedly sought to distance himself from some of his previously-expressed views (by, for example, at least recognizing a constitutional right to privacy in the liberty clause of the Fourteenth Amendment, and by claiming that he never intended his belief in natural law to be used in constitutional adjudication), but he repeatedly refused to comment on his view of the constitutional right to choice. This is something that the Senate and the American people have a right to know.

Given that the constitutionality of the right to reproductive choice is certain to be reevaluated by the Supreme Court, given that his vote on this issue could be crucial to its outcome, and in view of his previously-stated antagonism to the right to choice, Judge Thomas should not be confirmed.

### Conclusion

Presenting MALDEF's position in opposition to the confirmation of Clarence Thomas is not a task that I have looked forward to at all.

I know Judge Thomas. I consider him a friend. And, as other witnesses have brought to the attention of this Committee, there is no question that he has many extremely positive qualities.

Additionally, on matters of importance to Hispanics, there similarly is no question

that, during his tenure at the EEOC, he was accessible to me in my various roles at MALDEF, and that he was accessible to others too. He also was sensitive to matters of particular concern to Hispanics. Illustrative was his support for Spanish-language forms and brochures. And commendable here was his testimony in response to Senator DeConcini (on Thursday, September 12) about his opposition to English-only policies which affect Hispanics so negatively.

Nevertheless, in determining our position here, we at MALDEF had to look at the entire picture in the context of a Supreme Court nomination, and we in particular had to look closely indeed at Judge Thomas' legal and philosophical views about the civil rights laws and constitutional provisions, and about Supreme Court decisions interpreting them, all of such importance to protecting and advancing the rights of Hispanics. The big picture, we found, was not at all a positive one.

Based on his widely-expressed legal and constitutional views, which are summarized herein, we reached the inescapable conclusion that Judge Thomas should not be, and cannot be, on the Supreme Court. We accordingly urge the Senate to exercise its co-equal role in this process by not confirming Clarence Thomas as an Associate Justice of the Supreme Court of the United States.

# Alliance Justice<sup>for</sup>

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FRANCES DUBROWSKI  
Chair

## TESTIMONY ON THE NOMINATION OF CLARENCE THOMAS TO THE SUPREME COURT

### MEMBERS

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and Educational Fund  
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Education Fund  
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Defense Fund  
Women's Law Project  
Women's Legal Defense Fund

The Alliance for Justice appreciates the opportunity to present testimony on the nomination of Judge Clarence Thomas to the United States Supreme Court. The Alliance is a national association of public interest legal organizations representing minorities, women, labor, children, consumers, the environment, and the poor.

The federal courts historically have played a critical role in leveling the playing field for the underrepresented and disadvantaged in our society. Because of our belief that the courts are central to the struggle for equality and fairness in society, the Alliance launched its Judicial Selection Project in 1985. The cornerstone of the project is an extensive review of each federal judicial nominee's competency, integrity, and commitment to equal justice.

The Alliance opposes the nomination of Clarence Thomas to the Supreme Court. In a statement released July 29, 1991 (see attached), the Alliance concluded that Judge Thomas' extensive record as head of the Equal Employment Opportunity Commission and his writings and speeches demonstrated a stubborn unwillingness to enforce federal law consistent with Congressional intent and a judicial philosophy that threatens to undermine constitutional protections. After closely following Judge Thomas' testimony before the Senate Judiciary Committee, the Alliance remains firmly convinced that the nominee's views pose a threat to individual rights and liberties.

At his confirmation hearings, Judge Thomas adopted a strategy to disavow past statements that were either controversial or inflammatory. In doing so, he was asking the Senate to disregard his prior positions in evaluating his fitness for the Supreme Court. It should categorically reject that request. President Bush nominated Judge Thomas for the Court precisely because of his record as an outspoken partisan for conservative causes. He should not be allowed to disown that record now.



**SUMMARY OF JUDGE THOMAS' RECORD**

Before he was appointed to the District of Columbia Circuit, Judge Thomas compiled an extensive record. As summarized more fully in the attached opposition statement, that record displays a defiance of the rule of law and an excessively narrow role for the courts in protecting individual rights and civil liberties.

Judge Thomas' tenure as chairman of the EEOC was marked by an overall disdain for the nation's civil rights laws. As chairman, he imposed his personal views of anti-discrimination on the agency--contrary to the will of Congress, the overwhelming weight of Title VII case law, and the traditions of the agency itself. He took numerous positions that weakened the EEOC's commitment to enforcement of the law and proved inimical to the rights of workers.

In addition, before his nomination, Judge Thomas consistently advocated a very limited, at times radical, role for the courts. He passionately spoke of natural law and economic rights. He lamented the "willfulness . . . of run-amok judges" and criticized numerous civil rights precedents, labeling them "rather creative interpretations of equal protection and legislative intent . . ." (Speech before the Cato Institute, October 2, 1987, at 7). Prior to the hearings, he did not speak of evolving constitutional standards. Rather, he scorned "the nihilism" of Oliver Wendell Holmes, rejected the judicial philosophy of William Brennan, and praised the opinions of Justice Scalia.

**CREDIBILITY**

Judge Thomas' testimony before the Senate Judiciary Committee exacerbated the Alliance's concerns about his record and his fitness for the Supreme Court. Riddled with contradictions, disavowals, and evasions, it lacked both candor and credibility.

**Contradictions:** Judge Thomas' contradictions are most starkly indicated in his comments on natural law. Before confirmation, Judge Thomas wrote that "[t]he higher-law background of the American Constitution, whether explicitly invoked or not, provides the only firm basis for a just, wise and constitutional decision." "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law and Public Policy 63, 68 (1989) (emphasis in original). However, in the very first round of questioning before the Committee, Judge Thomas stated "I don't see a role for the use of natural law in constitutional adjudication."

(September 10, 1991, Tr. at 137).

If Judge Thomas had changed his mind about the role of natural law in constitutional adjudication, he had ample opportunity during the hearings to say so and explain the reasons. Instead, he blatantly and inexplicably contradicted prior, unequivocal statements. Only after much prodding by Chairman Biden did Judge Thomas finally admit that natural law does impact the adjudication of cases, "[t]o the extent that the Framers believed." (September 12, 1991, Tr. at 43-44). By that time, his inconsistencies had inescapably clouded any understanding of his judicial philosophy.

**Disavowals:** Some of Judge Thomas' remarks during his testimony can be categorized only as outright disavowals of past positions. A glaring example of this is his comment about Johnson v. Santa Clara County Transportation Agency, which upheld an employer's voluntary affirmative action plan designed to bring more females into traditionally and overwhelmingly male-dominated positions. Judge Thomas, while he was Chairman of the EEOC, harshly criticized the Supreme Court decision, praising instead Justice Scalia's dissent. Of the dissent, he stated "I hope [it] will provide guidance for lower courts and a possible majority in future decisions." (Speech before the Cato Institute, April 23, 1987, at 20-21). When Senator Kennedy asked him why he was urging lower courts to follow the dissent, Judge Thomas replied that "in using the word 'guidance,' I suggested . . . we look at the opposite side of the argument." (September 12, 1991, Tr. at 80). Dubious at best, that explanation shows no recognition of the message the statement was sending to judges.

**Evasions:** The right to privacy and the Supreme Court's role in preserving it has been a burning public issue in this country for the past decade. Yet, on no issue was Judge Thomas more evasive. He quickly stated his belief in a right to marital privacy, which he had to do in order to pass even minimum scrutiny by the Committee. However, marital privacy is the only privacy right that Judge Thomas unequivocally recognized as constitutional. He flatly refused to comment on Roe v. Wade, the landmark case recognizing a woman's fundamental right to choose to terminate her pregnancy. He even said he did not have a personal opinion on Roe. (September 11, 1991, Tr. at 105-106).

Moreover, the evasiveness of Judge Thomas' testimony on personal privacy went beyond Roe. He painstakingly circumvented Chairman Biden's questions about the fundamental right to privacy of single persons. Even when Chairman Biden pulled from him a "yes" to the question of whether he believed the Constitution protects a single individual's right to privacy in the area of procreation, Judge Thomas felt compelled to add "I have expressed on what I base that, and I would leave it at that." (September 13, 1991, Tr. at 120). At a minimum, this is not the kind of

answer that instills confidence about Judge Thomas' views of the right to privacy outside the marital relationship.

Finally, Judge Thomas avoided questions on the controversial White House Working Group on the Family report, which criticized as "fatally flawed" a number of Supreme Court right to privacy cases, including Roe. Although Judge Thomas was the highest ranking Reagan Administration official on the Working Group, he said he never read the report and did not realize it contained criticism of numerous privacy cases. He gave a similar explanation in avoiding questions about Lewis Lehrman's anti-abortion article. His explanation -- that he had not reviewed the article in preparation for his testimony, despite the highly publicized controversy it generated after his nomination -- implies willful evasion. More importantly, it trivializes an issue that is of primary concern to the American public.

In an attempt to explain the inconsistencies in his testimony, Judge Thomas stated that his past statements and positions were taken as a policymaker, not as a judge, and therefore should be discounted. He implied that they were of little relevance to the question of what judicial philosophy he will bring to the Supreme Court. That is utterly untenable. A person cannot -- and should not -- shed his personal philosophy when he or she dons a black robe. Personal philosophy is the most relevant evidence of judicial philosophy. Judge Thomas' failure to recognize the inseparable link between the two only casts further doubt on his fitness for the Court.

#### THE NEED FOR MODERATION

The departure of Justice Thurgood Marshall from the Supreme Court represents a pivotal point in the history of the Supreme Court. Led by Chief Justice Rehnquist, the Supreme Court has embarked on a brazen course to overturn significant constitutional protections with which it ideologically disagrees. It was disturbing and ironic that as Justice Marshall was bringing his Court tenure to a close, Chief Justice Rehnquist was "send[ing] a clear signal that essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination." (Marshall, J., dissenting in Payne v. Tennessee).

The Court's present course makes it imperative that the Senate halt the ideological court-packing plan of the Reagan/Bush Administrations. The Senate should insist on a nominee who will bring moderation to an increasingly monolithic Court out of step with the American people. Judge Thomas is not that nominee.

**CONCLUSION**

Justice Thurgood Marshall brought to the Supreme Court an extraordinary sensitivity and insight to the plight of those suffering injustice. Conversely, Judge Thomas has displayed a disrespect for the law and an indifference to the very individuals he was entrusted to protect. An individual who throughout his career overlooked the most vulnerable in our society and openly flouted the law presents too great a risk of reversing this country's progress towards equality and justice. Given the current course of the Court, which has declared open season on standing precedents, the country cannot afford to give Judge Thomas the benefit of the doubt on his longstanding, but recently disavowed, record.

# Alliance Justice<sup>for</sup>

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## STATEMENT OF THE ALLIANCE FOR JUSTICE

### ON THE NOMINATION OF

### CLARENCE THOMAS TO THE SUPREME COURT OF THE UNITED STATES

July 29, 1991

## INTRODUCTION

The Alliance for Justice, a national association of public interest legal organizations, opposes the nomination of Judge Clarence Thomas to the United States Supreme Court. Judge Thomas' extensive record as chairman of the Equal Employment Opportunity Commission and his writings and speeches demonstrate a stubborn unwillingness to enforce federal law consistent with Congressional intent and a judicial philosophy that threatens to undermine Constitutional protections.

In February 1990, the Alliance issued a detailed report raising questions about Judge Thomas' nomination to the U.S. Court of Appeals for the D.C. Circuit. The report reviewed and analyzed Judge Thomas' tenure at the EEOC and concluded that he had promoted positions that weakened the agency's enforcement of federal anti-discrimination laws. Judge Thomas' brief tenure on the Court of Appeals has done nothing to alleviate our concerns. We urge the United States Senate to reject this nomination and send a message to the President to nominate an individual who will bring moderation to a run-amok Supreme Court bent on overturning, not interpreting, existing law.

## CONSTITUTIONAL INTERPRETATION - OUT OF THE MAINSTREAM

Just 43 years old, Judge Thomas, if confirmed, will likely be a powerful and influential voice on the Supreme Court for decades. Unfortunately, his writings, speeches, and public comments portray a Constitutional philosophy that is dangerously out of the mainstream.

In his writings and speeches, Judge Thomas displays an inclination toward an extremely restrictive philosophy. For



example, he has severely criticized Griswold v. Connecticut, which upheld the rights of a married couple to use birth control and recognized the constitutional right to privacy. He has also mocked the Supreme Court's use of the Fourteenth Amendment's due process and equal protection clauses as "extremely creative. . . . The Court has used them to make itself the national school board, parole board, health commission, and elections commissioner, among other titles." (1988 Speech to Wake Forest University). Such a view shows no recognition of the vital barrier the 14th Amendment imposes to protect the disadvantaged from unlawful government action.

Judge Thomas also displays a strong adherence toward "natural law" theory, which he says stems from a belief in "the laws of nature and of nature's God." (Speech to the Pacific Research Institute). He has used the natural law theory to repudiate the reasoning in Brown v. Board of Education, which struck down the "separate but equal" doctrine. More startling, however, are his comments on natural law and a women's Constitutional right to choose. His views on choice were telegraphed when he praised an article proclaiming that a fetus has a Constitutional right to life as a "splendid example of applying natural law." (1987 Speech to Heritage Foundation). This comment indicates more than just a likely vote to overturn Roe. It implies that Judge Thomas believes the Constitution actually forbids abortion. Under this reading, states would not be free to enact laws protecting a woman's right to choose.

Judge Thomas' views on economic liberties also illustrate a Constitutional vision out of the mainstream. He describes economic liberties as "protected as much as any other [Constitutional] rights." The economic rights doctrine was routinely invoked from 1905 to the mid-1930s by the Lochner-era Court to strike down legislation setting limits on work hours and minimum wages, barring child labor and protecting the right of workers to organize. However, the doctrine has been discredited for decades. Will Judge Thomas, in the name of natural law, revive the economic rights doctrine, at least in some form, and strike down laws designed to protect the environment, eradicate discrimination, or enhance worker health and safety? Some of his writings point to an affirmative answer.

Finally, Judge Thomas has hinted at a predisposition for judicial activism reminiscent of that of former Judge Robert Bork. In a 1987 speech at the Cato Institute, he showed signs that he would willingly overturn Supreme Court precedent on Constitutional issues. In criticizing Johnson v. Transportation Agency of Santa Clara County (1986), which upheld an employer's right to establish a gender-conscious affirmative action policy, he commended "Justice Scalia's dissent, which I hope will provide guidance for lower courts and a possible majority in future decisions."

#### LACK OF COMPASSION

Many have argued that Judge Thomas' background and life experience have provided him with a sensitivity and insight to the concerns of the poor and disadvantaged in our society. They believe that Judge Thomas will therefore bring diversity to the Court that would otherwise be lacking with the departure of Justice Marshall. Unfortunately, while his life experience is inspirational to all Americans, his record displays an

animosity to views different from his own and a disregard for the needs of others.

For example, Judge Thomas repeatedly attacks the leaders of the civil rights community and denigrates their contributions to the fight for equality. He has stated that "[a]ll too often, the players in [the civil rights] arena intentionally distort and misinform. The tendency is to exploit issues rather than solve problems." (1986 Speech at the North Carolina Affirmative Action/EEO Conference). He has also commented:

"[A]s long as the convenient and unflattering history of this country can be trotted out to support so-called progressive policies, politicians who thrive on creating miseries that can only be solved by them and government and civil rights groups who are adept at the art of generating self-perpetuating social ills, will continue to beat back the voices of reason."

(1986 Speech to Associated Industries of Cleveland).

His indifference towards his sister's plight underscores the concerns about his regard for the needs of others. A single parent, his sister worked two minimum wage jobs while an aunt took care of her children. When the aunt became ill and could no longer take care of herself or the children, Judge Thomas' sister had to quit her job and resort to governmental assistance. She is currently back in the workforce, and no longer on such assistance. However, Judge Thomas publicly depicted his sister as lacking initiative and so dependent on welfare that she "gets mad when the mailman is late with her welfare check." (Washington Post, December 16, 1980). He added that "[w]hat's worse is that now her kids feel entitled to the check, too. They have no motivation for doing better or getting out of that situation." This, too, is a distortion. Her oldest son recently served in the Persian Gulf War, and her other son is a carpenter. One of her daughters was recently laid off from her job in a bakery, and the youngest daughter is still in school. (Los Angeles Times, July 5, 1991).

#### LACK OF RESPECT FOR THE RULE OF LAW

Judge Thomas' tenure as chairman of the EEOC was marked by strife and confrontation with Congress and an overall disdain for the nation's civil rights laws. As chairman, he imposed his personal views of anti-discrimination on the agency, contrary to the will of Congress, the overwhelming weight of Title VII case law, and the traditions of the agency itself.

Congress created the EEOC with the mission to eradicate prejudice and inequality of opportunity in the workplace. Established under Title VII of the historic, bipartisan Civil Rights Act of 1964, the EEOC was intended to be the advocate for workers against biased employers. As the agency matured, its enforcement powers and mandate were strengthened by both Congress and the executive branch. By the late 1970s, the EEOC was the lead agency in coordinating all federal equal employment policies and procedures.

As chairman, Judge Thomas took numerous positions which weakened the EEOC's commitment to enforcement of the law and proved inimical to the rights of workers. For example, in several cases under the Age

Discrimination in Employment Act (ADEA) -- intended by Congress to outlaw discrimination against older workers -- Judge Thomas urged the Commission to side with employers, or not to litigate on behalf of victims, despite overwhelming evidence of discrimination. He proposed regulatory measures under the ADEA that limited the scope of its protections. In addition, the agency allowed possibly over 13,000 age discrimination complaints to lapse by failing to investigate them before the two-year time limit ran out for filing suit in federal court. Congress bailed him out by extending the time limit for such cases. However, Judge Thomas still failed to act responsibly to correct the problem. He allowed several thousand more ADEA complaints to expire, again requiring Congress to intervene.

In addition, Judge Thomas effectively dismantled the agency's systemic litigation operations, a component of EEOC litigation to combat broad, institutional patterns and practices of discrimination. In an agency reorganization, he split the systemic unit among several divisions, which resulted in the unit's loss of independence and power. In March 1985, a bipartisan group of forty-three members of the House of Representatives wrote that a retreat from systemic litigation "would be in direct contradiction of the original intent of Congress" in passage of the 1964 Civil Rights Act and the 1972 amendments and would result in the agency losing important tools of enforcement.

Judge Thomas also sought to dilute EEOC rules that were the collaborative product of five federal agencies. The rules, known as the Uniform Guidelines on Employee Selection Procedures, bar employers from using hiring practices that effectively hinder the employment of qualified women and minorities. He often stated that the rules subverted the intent of Title VII, even though they were consistently supported by Congress. Judge Thomas dropped his plans after House members criticized them.

In the area of affirmative action to remedy past discrimination, Judge Thomas abandoned the agency's longstanding policy of encouraging the use of goals and timetables for hiring qualified women and minorities, despite approval of their use by Congress and all of the courts of appeals addressing the issue. Only when the Supreme Court issued three decisions upholding the policy did Judge Thomas reluctantly agree to reinstate it. However, he continued to send contrary messages to victims and to the business community by publicly and repeatedly criticizing affirmative action. Finally, Judge Thomas abdicated all responsibility for enforcing the EEO laws in the federal government, the nation's largest employer, by issuing an order that shifted the responsibility to agency heads, some of whom, such as then-Attorney General Ed Meese, balked at complying with federal sector affirmative action plans.

Judge Thomas' lack of respect for the rule of law was such that in June 1989, the Leadership Council of Aging Organizations sent a letter to President Bush questioning Thomas' qualifications for a federal judgeship. It stated that "people cannot properly take an oath to enforce certain laws and, once in office, work consistently to undermine them." In addition, fourteen chairs and high-ranking members of committees in the House of Representatives with oversight responsibility for the EEOC wrote to the U.S. Senate in July 1989 that Judge Thomas' "questionable enforcement record frustrates the intent and purpose" of Title VII of the 1964

Civil Rights Act and that he had "demonstrated an overall disdain for the rule of law."

#### HOSTILITY TOWARDS CONGRESS

Concerns about Judge Thomas' open-mindedness are compounded by his contempt for the role of Congress as it has evolved over 200 hundred years. Almost from the start of his tenure at the EEOC, Thomas attacked members of Congress. Instead of seeking to work with Congress and the public, Thomas created a climate completely counterproductive to forging new approaches to eliminating employment discrimination.

The nominee's hostility towards Congress is starkly reflected in his writings and speeches. In a 1988 speech at Wake Forest University, Thomas accused Congress of being "an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom." Thomas stated that Congress is actually run by subcommittee members and zealous staff members who, "in obscure meetings, . . . browbeat, threaten and harass agency heads to follow their lead." He adds that Congress no longer stands for a deliberative body which legislates for the common good or public interest.

In a 1989 law review article, Judge Thomas condemned Congress for examining potential abuses of power by the executive branch, stating that the legislature is "out of control" and that "numerous congressional investigations in recent years . . . seem little more than attempts to embarrass the White House." (Harvard Journal of Law & Public Policy, vol. 12, no. 1.)

Judge Thomas' disrespect for the rule of law and hostility towards Congress raises serious questions about his understanding of the separation of powers and his qualifications to interpret statutory law. On the Court, Judge Thomas will be called upon to revisit precedents and decide many issues involving legislative intent on numerous federal statutes protecting the environment, consumers, public health and safety, and civil rights. His EEOC record and writings and speeches indicate that he is likely to bring his own personal views to bear on those issues, rather than a loyalty to the law.

#### CONCLUSION: THE NEED FOR MODERATION

For the American people to have faith in the Supreme Court, the Court must be perceived as a balanced, open-minded institution. With the departure of Justice Marshall and the nomination of Judge Thomas, the American people face the prospect of a monolithic Court dominated by conservative philosophy lasting well into the twenty-first century. That prospect must not materialize. It is time for the Senate to draw the line and insist that the Court reflect the rich texture and complexity of American society itself.

Contrary to public announcements, both the Reagan and Bush Administrations have sought to appoint judges intent on making law rather than interpreting it. Their success thus far was illustrated by the 1990 term, which revealed a Court all too eager to abandon prior precedent in order to advance the Reagan-Bush conservative platform.

The Court's deferential philosophy presents a grave danger to the rights upon which Americans have come to rely. The judiciary is the only branch of government able to ensure that the liberties of all Americans are protected, including those who do not always have a voice in shaping the policies of Congress and the executive branch. The Court must be more than a compliant, politicized arm of the executive branch. By insisting that the President appoint an individual who will bring moderation to the Court, the Senate can ensure that the Court will remain independent and will reflect the diversity of viewpoints representative of American society.

# # # # #

Please note: Consumers Union, National Wildlife Federation, and Natural Resources Defense Council do not take positions on judicial nominations.

The CHAIRMAN. Thank you very much, Ms. Hernandez.  
Mr. Lucy.

### STATEMENT OF WILLIAM LUCY

Mr. LUCY. Thank you, Mr. Chairman, members of the committee. My name is William Lucy. I am here today as president of the Coalition of Black Trade Unionists, an organization of rank-and-file members of trade unions affiliated with the AFL-CIO. I am here to urge that the damage, the past injustices, and the insensitivity heaped upon workers in general and black workers in particular who sought redress and fairness before Mr. Thomas as a policy maker and implementor will not be disregarded.

For the past week, you have questioned the nominee. Like many of you, I sat while Mr. Thomas asked to be given high marks for his personal achievements, to be forgiven for his omissions, and for you to totally ignore any shortcomings in his record.

The American Bar Association, from among the options available, chose to designate Mr. Thomas as "qualified." While this is no small achievement, this rating for a Supreme Court vacancy would not be acceptable in a colorblind process. If "qualified" or "average" becomes acceptable, let us all understand that it is acceptable only because the candidate is black and replacing a black.

As we review some of Mr. Thomas' speeches and writings, we must be concerned about his views, views such as those expressed in his article in the Yale Law and Policy Review. Mr. Thomas wrote:

I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals, both those individuals who are directly disadvantaged by them and those who are their supposed beneficiaries.

While it is clearly possible for the nominee to be misquoted or misunderstood, Mr. Thomas' views in this case can't be faulted for lack of clarity. His is the bedrock argument used by those who raise the cry of reverse discrimination. It seems to me that you cannot hold the notion of reverse discrimination without accepting the fact of basic discrimination, which is what the EEOC was created to deal with.

And yet, while chairman of that agency, Mr. Thomas put far more emphasis on reverse discrimination than on its unavoidable root. According to Mr. Thomas, and I again quote,

The government cannot correct the wrongs of the past. There is no government solution to ending discrimination and we should not attempt to remedy longstanding, historic cases of discrimination against a group of people.

These words lead only to the conclusion that he does not believe that government should step in to help injured parties in cases of systematic and institutional discrimination, that individuals must seek legal redress strictly on their own.

Mr. Thomas cannot possibly believe that black people, women or other ethnic groups suffer systematic discrimination as individuals. His statement opposing class action remedies strongly suggests that he believes that institutions should not be held accountable for their discriminatory behavior and should not be forced by government to change that behavior. Mr. Thomas leaves us with this

absurdity: a wrong that affects millions should be dealt with on a one-by-one basis.

We further believe that Mr. Thomas has demonstrated a striking lack of understanding of women workers. His belief that women decide to fill jobs of lower status and lower pay than men in order to accommodate family life reflects a total lack of understanding of the realities of working women, and particularly those single parents who head households.

Women today, and particularly black women, are not exercising an option when they go to work. They work because they have to, and every dollar taken from them by gender-based wage discrimination denies them economic justice. The failure of the Equal Employment Opportunity Commission under Mr. Thomas' leadership to even investigate thousands of complaints alleging gender-based wage discrimination in violation of the Equal Pay Act and Title VI of the Civil Rights Act reflects flagrant disregard for the serious problems that Congress had sought to remedy.

Assuming Mr. Thomas believes what he says that government cannot correct the wrongs of the past and that there is no government solution to ending discrimination in the workplace, as a black male I have a difficult time and would have a difficult time placing before Mr. Thomas as a Supreme Court Justice the most critical question affecting blacks and other minorities—economic exploitation and systematic denial of opportunity.

During the last 10 or 12 years, we have witnessed implementation of policies designed to roll back progress towards the equality that our Nation achieved at great cost. In the course of this retreat, millions of hard-working Americans, without regard to sex, age, race or creed have sought the protection of the EEOC only to become frustrated by appointees who refuse to carry out the mission that Congress assigned the agency.

Mr. Chairman, you and members of this committee must evaluate a man who either did things he did not believe in or believed in things he did not do. Whichever the case, many workers have paid a high price in consequence.

Mr. Chairman, if the EEOC had been headed by a conservative who was white who so singly failed to uphold the mandate of that agency, that person's name would not be before you today as a nominee.

Thank you.

[The prepared statement of Mr. Lucy follows:]



**COALITION OF BLACK TRADE UNIONISTS**

**EXECUTIVE COMMITTEE:**

WILLIAM LUCY, *President*  
Secy-Treas., AFBCME, AFL-CIO  
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**TESTIMONY OF  
WILLIAM LUCY, PRESIDENT  
COALITION OF BLACK TRADE UNIONISTS  
ON  
THE NOMINATION OF JUDGE CLARENCE THOMAS  
TO THE U.S. SUPREME COURT  
BEFORE THE  
UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY**

**SEPTEMBER 19, 1991**



Mr. Chairman and distinguished members of the Senate Judiciary Committee, I am William Lucy, President of the Coalition of Black Trade Unionists (CBTU) and Secretary-Treasurer of the American Federation of State, County, and Municipal Employees (AFSCME). I am extremely pleased to have this opportunity to come before you today to share my thoughts on the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

I am here representing the views of the Coalition of Black Trade Unionists. The CBTU represents the views of concerned workers, but particularly Black workers. We decided to oppose this nomination for a number of reasons. Most importantly, we believe that as a Supreme Court Justice, Judge Thomas would not act in the best interest of the working men and women in this country, particularly Black workers. His questionable public record as an official at the Department of Education and as Chairman of the Equal Employment Opportunity Commission (EEOC), his limited judicial qualifications, his numerous writings and speeches, indeed his entire professional background, leave us with uneasy feelings about what his confirmation could mean for the men and women we represent. Moreover, we believe that the content of his character is of grave importance – not the color of his skin or the numerous barriers he has overcome to reach his current status in life. All of this is of little consequence in determining his qualifications to sit on the Supreme Court.

Once we take a closer, more objective look into the public record of Judge Clarence Thomas, which Mr. Chairman, you spent the better part of last week doing, we must now ask ourselves what he actually accomplished as an official at the

Department of Education and the EEOC. I believe an examination of his public record and indeed his testimony last week reveal that he did not carry out his agencies' mandates. Instead Judge Thomas ran the Office of Civil Rights (OCR) at the Department of Education and the EEOC, based on his own opinions and philosophy, not on prevailing law. If we find that my belief is true, that his public record is so unsatisfactory, then we have to ask ourselves, "why are we, in effect, rewarding him for poor performance and why are we even considering this man for a seat on the Supreme Court?" Judge Thomas must be held accountable for what I believe is an unsavory record.

Judge Thomas went to the OCR in May of 1981. At the OCR Judge Thomas was charged with enforcing laws barring discrimination in education. It was his responsibility to enforce the laws that require institutions receiving federal funds to refrain from discriminating on the basis of race, sex or disability. Before Judge Thomas' arrival civil rights groups had successfully filed a court suit, Adams v. Bell against the Department (then HEW), resulting in a settlement requiring the OCR to investigate complaints, conduct compliance reviews and initiate enforcement action in accordance with specific time frames. This settlement set the atmosphere in which the OCR was mandated to operate.

Judge Thomas did not follow the terms of the settlement and admitted that he was violating the court-ordered requirements for processing civil rights cases. A hearing was held to investigate Judge Thomas' failure to comply with the court

order. When the judge asked Judge Thomas:

*"...But you're going ahead and violating those time frames; isn't that true? You're violating them in compliance reviews on all occasions, practically, and you're violating them on complaints most of the time, or half the time; isn't that true?"*

Judge Thomas responded:

*That's right.*

Judge asked:

*So aren't you, in effect substituting your judgment as to what the policy should be for what the court order requires? The court order requires you to comply with this 90-day period; isn't that true?"*

Judge Thomas responded:

*That's right..."*

Ultimately, a federal judge cited that the OCR was guilty of misinterpreting and inadequately enforcing Title IX, the statute which prohibits gender discrimination in federally-funded education programs and institutions. Judge Thomas' tenure at the OCR resulted in students being assigned to classes for the mentally retarded because of their race or national origin, a suspension of the processing of improper job discrimination complaints against the handicapped by universities and, long delays in

the handling of discrimination complaints.

Judge Thomas brought his own perception of the law and established policy with him to the EEOC. It was Judge Thomas' responsibility at the EEOC to enforce federal laws that prohibit employment discrimination on the basis of sex, race, national origin, religion, and age. Judge Thomas, however, ran the EEOC based on his own opinions and philosophy and not on the prevailing law. He ignored the authority given the EEOC to vigorously attack widespread institutional patterns and practices of discrimination in the workplace. Instead, he eliminated or attempted to eliminate from the Commission proven mechanisms for enforcing federal antidiscrimination law.

Particularly troubling about Judge Thomas' tenure at the EEOC is his attempt to weaken the Uniform Guidelines on Employee Selection Procedures which are based on a unanimous decision by the Supreme Court in *Griggs v. Duke Power Company* in 1971. These guidelines were designed to help employers comply with federal antidiscrimination laws when implementing tests for the purposes of hiring and promotions. *Griggs* prohibits the use of employment criteria that have a disparate impact on women and minority workers or applicants unless the criteria are proven to be job-related. *Griggs* has played a critical role in removing barriers that have historically limited job opportunities for women and minorities. Fortunately, criticism by certain Members of Congress prevented Judge Thomas from weakening the guidelines.

Judge Thomas criticized the EEOC's reliance on class action litigation and severely weakened the litigation unit at the EEOC specifically created to address systematic discrimination in the workplace. He reduced the number of attorney's assigned to this unit by half. And, he eliminated the system for identifying systemic cases. In 1980, before Judge Thomas arrived at the EEOC, the Commission filed 218 class action suits. In 1989, Judge Thomas' last year at the EEOC, the Commission filed only 129 class action suits. Judge Thomas wrote in the *Yale Law and Public Policy Review* in 1987, in an article "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" that "emphasis on 'systemic' suits led the Commission (prior to his appointment) to overlook many individuals who came before their offices to file charges and seek assistance."

Unfortunately, Judge Thomas also relaxed its enforcement of individual cases at the EEOC. Under Judge Thomas individuals were unlikely to receive any type of remedy to their claims. In fact, in 1980 settlement rates were over 30 percent while in 1989, under Judge Thomas, settlement rates were down to 14 percent. Cases were inadequately investigated and the number of cases where the claimant received no remedy at all doubled. A 1988 General Accounting Office study found that this change in the Commission's success rate was due to cases not being fully investigated. Basically, people were denied their rights under the law to have discrimination claims adequately investigated.

Judge Thomas has also repeatedly questioned the effectiveness of affirmative action policies. He used his position at the EEOC to dismantle affirmative action programs which had proven to be effective and which helped to protect the rights of women and minorities from discriminatory practices in the workplace.

The use of goals and timetables for the training, hiring, and assigning or promoting of qualified women and minorities was an important aspect of the EEOC affirmative action program. In 1984, Judge Thomas announced that the EEOC would discontinue its use of goals and timetables. He did so in spite of substantial evidence that goals and timetables had benefitted women and minorities and in spite of several Supreme Court decisions upholding the use of goals and timetables. During his reconfirmation hearings as EEOC chair, Judge Thomas promised to discontinue his attack on goals and timetables. He returned to the EEOC and continued his attack on the Commission's affirmative action policies including goals and timetables. Judge Thomas wrote in a publication titled *"Assessing the Reagan Years,"* in 1988, that "I am confident it can be shown, and some of my staff are now working on this question, that blacks at any level, especially white collar employees, have simply not benefitted from affirmative action policies as they have developed."

Judge Thomas' record shows that although he had sworn to uphold the prevailing laws against employment discrimination, he continued to write and give speeches showing his opposition to affirmative action. Judge Thomas also continued to criticize important Supreme Court decisions dealing with combatting discrimination in the workplace.

United Steel Workers v. Weber (1979) is a particularly important decision because it encourages and allows employers to take voluntary action to correct past discriminatory practices without employees or the government entering into litigation. Judge Thomas in five speeches in 1982 and 1983 supported the decision in Weber. Then in a speech in 1987 to the Cato Institute, Judge Thomas announced that he disagreed with the Court's findings in Weber. Judge Thomas flipped-flopped on one of the most important Supreme Court decisions dealing with discrimination in the workplace.

In Fullilove v. Klutznick (1980) the court held that Congress had a constitutional right to correct past discrimination by passing appropriate legislation. The case dealt with a set-aside program enacted by Congress to alleviate historic discrimination against minorities in the construction industries. The Court found that Congress' response was appropriate in enacting the set-aside program in response to proven charges that minority businesses had historically been denied contracting opportunities because of unfair procurement practices. Judge Thomas criticized the decision in a paper titled Assessing the Reagan Years in 1988 by saying:

"the Court reinterpreted civil rights laws to create schemes of racial preference where none was ever contemplated."

Judge Thomas also criticized Johnson v. Transportation Agency, Santa Clara County (1987), where the Supreme Court upheld Santa Clara County's voluntary affirmative action program which was implemented to correct historic underrepresentation by women in certain well paying jobs. The Court said that the county's plan to consider gender and ethnicity when choosing among qualified candidates was acceptable when these groups were underrepresented. Judge Thomas wrote in a New York Times article titled, "Anger and Elation at Ruling on Affirmative Action,":

"It's just social engineering, and we ought to see it for what it is. I don't think the ends justify the means, and we're standing the principle of nondiscrimination on its head -- it's simple as that -- and we're standing the legislative history of Title VII on its head."

In Local 28, Sheet Metal Workers v. EEOC (1986), the court held that race conscious remedies such as goals and timetables may be used to correct intentional racial discrimination. The case involved flagrant and long-standing intentional discrimination against Black workers as well as a disregard of federal court orders. Early in 1987, Judge Thomas appeared to agree with the decision. Later that year Judge Thomas grouped Sheetmetal Workers with Weber and subsequent cases all together saying that they were all mistaken applications of Title VII. Judge Thomas later wrote in a 1987 law review article,

"I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head...I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context."

Judge Thomas also brought a strong and inappropriate pro-business bias to his role as Chairman of the EEOC. When elderly employees of the Clorox Corporation came before the EEOC because they were being fired and replaced with younger, lower paid workers, Judge Thomas refused to investigate their complaints. He said, "This is a standard practice in industry." It may have been standard practice in industry, but EEOC regulations clearly state that economic necessity is not a legal justification for such a practice. Judge Thomas, therefore, chose to ignore the Commission's own regulations while placing his opinions before the law.

The elderly suffered many undo hardships under Judge Thomas at the EEOC. He sat on over 13,000 age discrimination cases until Congress found it necessary to rescue these victims of age discrimination. The EEOC, under Judge Thomas, also failed to rescind regulations that allowed employers to stop making pension contributions for workers over the age of 65. Congress stepped in to pass a law

specifically requiring employers to make pension contributions for employees over age 65. The EEOC continued its insensitivity towards older workers by failing to issue the regulations after Congress passed remedial legislation.

Judge Thomas' record shows a deep insensitivity towards the rights of the elderly in the workplace. He failed to enforce federal age discrimination laws while taking positions even in defiance of the Congress, which went against the economic interests of older workers.

We must take a close look at Judge Thomas' personal opinions when examining his policy decisions. His opinions on women are particularly insightful when reviewing his policies towards women at the OCR and the EEOC. Judge Thomas embraced an analysis of working women, written by a right wing academic, that denies the existence of sex discrimination and rejects the notion that such discrimination plays a part in women working in lower paying, lower status jobs. This analysis suggested that women were in jobs of lower pay and lower status than men because they made decisions about employment in order to accommodate their roles as wives and mothers, and, further, that any inequities which exist between men and women in the workforce are due to women's behavior -- opting for jobs which allow them more flexibility. The analysis went on to say that Black women did better in the work force than white women, a notion which is totally incorrect. Judge Thomas told readers of the November 1987 issue of *Reason Magazine* that, "I consider the author

of this concept not only an intellectual mentor, but my salvation as far as thinking through these issues." Judge Thomas went on to say in the *Lincoln Review* in 1988 that the above-mentioned analysis on working women is:

"...a useful concise discussion of discrimination faced by women. We will not attempt to summarize it except to note that by analyzing all the statistics and examining the role of marriage on wage-earning for both men and women, the author presents a much-needed antidote to clichés about women's earnings and professional status."

Mr. Chairman, women in our society today, most women, and Black women particularly, work out of necessity, not because they are exercising an option. Judge Thomas apparently is not aware of this fact. I am alarmed that someone who believes that gender discrimination does not exist may sit on the Supreme Court and judge sex discrimination cases which may come before the Court.

It is from this point of reference, or perhaps this lack of understanding about a fundamental aspect of the lives of working women, which we must view Judge Thomas' disturbing public record on women in the workplace. The EEOC, under Judge Thomas' leadership, rejected the concept of "pay equity" eliminating the hopes of many women in seeking comparable pay with their male counterparts. Major labor unions took Judge Thomas to task in an effort to remedy discrimination based on sex.

His failure to investigate large numbers of complaints alleging gender-based wage discrimination in violation of the Equal Pay Act and Title VII of the 1964 Civil Rights Act, prolonged the exploitation of millions of working women.

Judge Thomas' actions were particularly harmful to women of color, particularly Black women, who are often crowded in the lower paying, female dominated jobs. Federal civil rights laws provide the necessary means for addressing this inequity. The EEOC, under Judge Thomas, did not adequately enforce the applicable laws. In fact, wage discrimination complaints were mishandled and many were not investigated at all.

As a representative of working men and women of this country, particularly Black working men and women, I am extremely disturbed by Judge Thomas' record with regards to fair employment and equal opportunity for women, the elderly and racial and ethnic minorities. The thought that government should not intervene on behalf of all working people does not reflect the true story of the labor movement in this country.

Judge Thomas' record shows us that he does not have a commitment to equal justice under the law and he does not endorse equal employment opportunities. I do not see anything in his record that convinces me that Judge Thomas should be confirmed to sit on the U.S. Supreme Court -- not his ABA rating, not his performance

at the Department of Education, and certainly not at the EEOC. I reject Judge Thomas' assertion that we should not judge him on his record, a record that has damaged the lives of so many people who were victims of discrimination. I, therefore, urge the members of the Committee to reject the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

Thank you.

The CHAIRMAN. Thank you all very much. Mr. Chambers, let me begin with you, if I may. It was obviously a comprehensive brief filed with the committee. You say on page 8—and I realize you didn't have the opportunity to read all that is in here, but I had a chance to read it.

You said,

It is argued in support of Judge Thomas that he is merely a judicial philosophy, but these and other similar remarks are not judicial and involve no philosophy. Judge Thomas does not reach these conclusions,

Referencing things you have said in the previous seven pages,

By any general legal methodology that might be characterized as conservative or by any methodology that could plausibly be characterized as legal at all. There is no analysis of the language of relevant statutory constitutional provisions or regulations, no discussions of precedent, no consideration of Congressional debates or reports, no evaluation of experience of lower courts. There is in these and other statements no pretense that Judge Thomas arrived at his conclusion by conventional legal analysis. His evaluation of legal decisions follows directly from his personal ideological preferences about the matter at issue.

Now, let me ask you, does not that lend credibility to his assertion that these were just musings of a—how does he phrase it, part-time political theorist, and that they were not notions that were born out of a view of the Constitution that would lead him to those conclusions by applying whatever methodology he has to the Constitution?

Mr. CHAMBERS. Mr. Chairman, I think they would suggest more a lack of appreciation by the candidate on the proper basis for going through, analyzing legal judicial issues. What we get when presented with a number of facts—and when we look at history and when we look at where Congress, for example, in the voting rights area goes through and says that based on this evidence, it is imperative that we enact an effects test in the voting rights area, he condemns it without any kind of analysis.

And rather than talk about whether it is just a muse, I think more it is a question about the candidate's ability or judicial qualifications for serving as a Justice of the Supreme Court.

The CHAIRMAN. In exhibit A that you submitted, you indicated that each of the Justices—and exhibit A, for the record, is a listing beginning with Oliver Wendell Holmes, Jr., who served on the Court from 1902 to 1932, going all the way up through Justice Souter.

Mr. CHAMBERS. That is correct.

The CHAIRMAN. And you list the qualifications as they are from your perspective of Judge Thomas.

Mr. CHAMBERS. That is correct.

The CHAIRMAN. Now, you said each of these people possessed two qualifications, and I thought I was listening closely. I didn't hear what those two qualifications were.

Mr. CHAMBERS. They differed. We have in footnote 5 on page 12 of the submitted text listed 7 of the important qualifications we think that the nominees—each of the nominees possessed at least 2 of these qualifications.

The CHAIRMAN. I see.

Mr. CHAMBERS. They are identified in footnote 5 on page 12.

The CHAIRMAN. A substantial law practice either in the private or the public sector generally covering more than 10 years. You would suggest he does not have that, I assume.

Mr. CHAMBERS. That is correct.

The CHAIRMAN. Extensive legal scholarship or teaching; you would argue he does not possess that. Significant experience as a judge generally for five or more years; he clearly does not have that. The highest level of expertise in a particular area of law; he does not argue that.

Mr. CHAMBERS. That is correct.

The CHAIRMAN. Superior intellect. You have made a subjective judgment that he does not possess that, is that correct?

Mr. CHAMBERS. That is correct.

The CHAIRMAN. Ability to persuade and lead; generally outstanding achievement over the course of his career. "These are, in our view," quoting your report in footnote 5, "the most important qualifications to stand out in reviewing the more than 120-year span by the legal careers of 20th century judges."

I understand what you are saying now.

Let me go to you, Ms. Hernandez. You make a very telling point that all the focus, at least all of my focus on the equal protection clause in these hearings has related to the question of whether or not he was using that to avoid dealing with whether or not single individuals had a right to privacy. I think it is important for the record that you restate it. You raise the point that since many people that you represent are not American citizens and are, to use your phrase, if I am not mistaken, undocumented aliens, that arguably, based on his view of the equal protection clause, they would—to put it in laymen's terms, not be equally protected under the Constitution as American citizens are protected. Is that the point you are making?

Ms. HERNANDEZ. Well, it is even more than that, and let me restate it. The benefits and privileges guaranteed by the Constitution differ, and there are different protections whether you are a citizen, whether you a legal resident alien, and whether you are non-documented individual. And the equal protection, if you look at the 14th amendment, there are two clauses, and very little attention is given to those clauses. One is the equal protection that clearly says every person, and then it goes to—

The CHAIRMAN. And your argument is that he relies more on privileges and immunities, which applies to American citizens?

Ms. HERNANDEZ. Only. And in reading some of his writings, if you understand, he would—and he argues that *Brown*, too—he doesn't quarrel with the conclusion of the *Brown* decision. He quarrels with the reliance of the Court on the equal protection. He feels that it should rather be the privilege or immunities clause. And if you carry that argument through its conclusion and if his view were to prevail, the impact to the immigrant community, whether they be Asian, Hispanic, Ethiopian, Polish, whatever, will be significant, because the privilege or immunity says "every citizen." And as you know, the Supreme Court has just ruled on a case involving Hispanics and the issue of citizenship.

It is an issue that comes up quite a bit for our community.

The CHAIRMAN. Well, my time is up. Let me ask you this question. I realize that—well, I won't characterize it. Let me ask you this question. When he made the two speeches that I am aware of where he talks about the privileges and immunities clause being of greater consequence than it has been recognized to be, from his perspective, and when he argues that its application in *Brown* would have been appropriate, do you believe that his argument was based on and that he understood that its application might exclude—following his logic, exclude individuals who are not American citizens? Or do you believe he was just making a point to sustain his overall argument relative to black America and desegregation? Or does it matter?

Ms. HERNANDEZ. Well, one, I do not know. Two, it does not matter. If a certain individual places such importance on those matters which are critical to the interpretation of law and does not think through the implications that that would have to a broad-based, diverse community that this country is, then I would question, once again, the qualifications of that individual to say such matters. And I would urge that this issue be further looked into because, from my community's perspective, it is an additional factor that very directly impacts our community.

The CHAIRMAN. I appreciate your testimony and your answering my questions.

Senator Hatch.

Senator HATCH. Let me reserve my time.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much.

I want to join in welcoming this panel of witnesses. They have been in the vanguard of so many important efforts to ensure our freedoms and our equalities. I have had, as other members of the panel, the good opportunity to work with many of them for over a very considerable period of time, and this country is in debt to many of them for all of their tireless work on behalf of the Bill of Rights and the Constitution.

Mr. Chambers, you are aware of the time restraints that we have. I would like to cover a few areas. Judge Thomas criticized some of the Supreme Court decisions, primarily in the areas of voting rights. We had an exchange with him there. It was really unclear from the exchange what he was really driving at.

In your own study, were you able to determine the nature of the criticisms and the value of the criticisms of Supreme Court holdings, particularly in regard to the voting rights cases?

Mr. CHAMBERS. Senator Kennedy, the best that we have been able to determine was his statement here that he disapproved of the effects test and he disapproved of the types of districting or remedies that the courts were directing in voting rights cases.

It wasn't clear why he disapproves of the effects test except his continued questioning of the possible use of statistics to establish a violation. And under the effects test, if one demonstrates that a certain practice results in a deprivation, one makes that showing frequently through the use of statistics.

In terms of the remedy, the remedies, of course, of the record have been the only ones the courts have found effective. Exactly why he disapproves of those remedies, again, unless he is raising

some question about race, it isn't clear—under any circumstance. Again, this goes to his qualifications, I think.

He offers no alternative. He concedes that blacks have been deprived of voting opportunities. He concedes that the Senate and the Congress were looking at real practices when it was necessary to enact the 1972 amendments, and yet offers no remedy that would provide meaningful opportunities for minorities to participate in the electoral process.

Senator KENNEDY. Mr. Rauh, you have been very much involved, as most of the panel has, in the fashioning and shaping of various civil rights legislation. The key element of all of the legislation are remedies.

Going back to I guess even the 1957 Act, maybe even go back even further, but the importance of remedies in ensuring that the rights are going to be achieved and his approach as a case-by-case means, where would we really be if we had used a case-by-case approach in the various important pieces of legislation which have been accepted by the country, that had bipartisan support? When you look at public accommodations, the housing, the voting rights, the whole range of difference, where would we be as a society if we accepted or the Supreme Court accepted that route to try and remedy the discrimination in our society?

Mr. RAUH. We wouldn't have the right to vote in any serious sense. What happened in 1957 was, because it was on an individual basis, the law failed even though we all supported it because we wanted a civil rights law. In 1960 and 1964 there was tinkering, but it was always on a retail basis.

The whole thing changed in 1965 when it was on a wholesale basis. What happened in the 1965 law was that they said the Federal Government will register the people if these States continue to discriminate. The whole problem—I think one of the witnesses said it this morning. The distinction between wholesale and retail enforcement of the civil rights law is the distinction between success and failure.

Senator KENNEDY. Ms. Hernandez, it is good to see you back here again, and I commend you for your testimony.

The point that Judge Thomas makes—and I don't know whether Mr. Lucy will make a comment on this—is that given his particular background, he has a particular sensitivity. I mean, no one really disputes what has been an extraordinary life experience which he has had and admire his own personal determinations for self-improvement.

But you, Ms. Hernandez and Mr. Lucy, why doesn't that in and of itself—I think there are probably millions of Americans who have been watching these hearings and say, well, that is right, that will give him an insight in terms of the concerns for whether it is women, women of color, or minorities. Why doesn't that kind of emphasis or that kind of thrust give you a sense of confidence as to how the nominee might vote on questions of equal protection?

Ms. HERNANDEZ. Well, they haven't to date, and I must say that it is most commendable. Most Americans can relate to the strides, to the efforts, to the determination. I myself as an immigrant am familiar with that.

But one must look to the person and what he or she has done with that experience, and to date he doesn't have a clean slate. He has been in positions of power. He has been in positions of authority. He has been in a position to influence policy in a way that it would impact other people similarly situated. And we have the record on what he has done in those instances.

Mr. LUCY. I would certainly have to, Senator, support what was just said. In his public record as a public official, as a policymaker or policy implementor, he has never shown the kinds of sensitivity that ought to flow out of that past experience.

One of the Senators earlier on mentioned the fact that the polls show his—not necessarily approval rating but openmindedness waiting to hear. By and large, minorities want to be fair. But when you look at the record, his record doesn't suggest that he understands that.

I think, as he indicated, he believes discrimination exists. I think he is honest about that. But I think he believes it exists as it impacts on individuals as opposed to on groups.

I would so eagerly want to say to him, Senator, that when the sign said "No Irish Need Apply," that didn't mean Mr. O'Reilly or Mr. O'Rourke. That meant all. And he doesn't seem to grasp that even coming out of his own background. His resistance to class action remedies for the purpose of changing behavior strongly suggests that he thinks it is an individual personal situation.

Senator KENNEDY. My time is up, and I promise I won't ask a question of the next panel if I can ask Mr. Lucy the last one. But he will, I imagine, point out that the Constitution protects individuals, not groups.

Mr. LUCY. Well, certainly you would think that he would be aware of that in his own role and would have made more effort in his policymaking role to really apply the class action pursuit that had been given to them under the authority of the EEOC.

I would only add, Senator, that on the trade union side we are representing those who theoretically come through as beneficiaries of this entire civil rights-equal opportunity set of laws.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Welcome to this panel. I know many of you and have worked with many of you. And I have disagreed with many of you. I have always enjoyed that, and I mean that. Antonia Hernandez, you and I worked long and hard with the immigration issues, and I think that we would both agree that we have been fair with each other and always direct. And I have great respect and rich regard for you.

And I have known John Buchanan for many years. I do not know the other folks as well, but I know, indeed, of your reputation as well and have had you testifying here, the chairman has.

So you speak powerfully in opposition to Clarence Thomas. I understand that. I guess I would ask a question of Ms. Hernandez because I know her well. We have worked together on serious issues with immigration reform, illegal immigration. We have often, as I say, disagreed, but we have done so in a very honest and candid

and straightforward manner. And yet one part of your testimony caught my eye.

On page 6, it was the point of—you state, “Clarence Thomas’ opposition to affirmative action is based on his belief that the Constitution must in all circumstances be colorblind.” You then recite a number of cases you believe would be overturned if Clarence Thomas were on the Supreme Court.

My question is this: What is wrong with a colorblind society? Is that not what we have been seeking in this quest for perfection for decades?

Ms. HERNANDEZ. You are absolutely right. That is what we have been seeking and that is what I, more than anyone, want to have a society where the color of my skin or the gender is not an important factor, but my character.

The fact of the matter is that we are not dealing in a perfect world and we are dealing with a society that still has discrimination, it is much more difficult, it is much more subtle, and we must deal with societal discrimination.

The interesting thing—you were not here when I mentioned it—is I know Clarence very well. I worked with him when he was in the AK. I discussed his philosophy and point of view and his opposition to class remedies and tried to come up, as you know, I tried to come up with ways to deal and come up with solutions and ways we could prepare society and the legal profession in dealing on a one-to-one basis.

It is OK to believe in the goal of equality. It is not OK not to face reality and understand the discrimination that exists and attempt to deal with it. I am sometimes troubled by how we as a society zero in on this whole issue of dealing with problems on an individual basis when it deals with discrimination, and not dealing with situations on an individual basis in other matters.

When you deal with the banking situation, you don’t say, well, we are going to deal with, you know, fraud or mismanagement or problems in regulation on a one-to-one situation. You look at what is causing the problem, you see if it is systemic, you see if it is larger than that one situation, and you pass policies so that it doesn’t happen. Yet, when you are dealing with discrimination, all of a sudden it has to be 1 on 1 as it comes up and not having the systems to deal with those fortunate enough to go to an AK or to other agencies who protect their rights.

Senator SIMPSON. We have heard Martin Luther King’s name brought into this debate over these days many times, on both sides, interestingly enough, but the greatest civil rights leader, I think many would agree, was Dr. Martin Luther King and he asked only that he and his children be judged “based on the content of their character, and not on the color of their skin,” and isn’t what he was asking for was a colorblind judgment, and isn’t that just exactly what Judge Thomas is advocating?

Ms. HERNANDEZ. I also advocate that, but the fact of the matter is that we do not have that today and we must deal with that.

Senator SIMPSON. I think Judge Thomas has said that. But to have him criticized on that basis, I don’t understand that. That escapes me. I think that is what people have been talking about.

Well, did you set a quick clock on me?

The CHAIRMAN. We sure did. We gave everyone else 15 minutes, and you 5. [Laughter.]

No, Senator, we are giving everyone 5 minutes.

Senator SIMPSON. Oh, it is because Howard is done, is that it?

The CHAIRMAN. That's it. [Laughter.]

Senator SIMPSON. Well, I will come back. Thank you, Mr. Chairman.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Thank you.

Welcome to the panel. I appreciate the effort that you put in in analyzing this Judge, I must say, you have spent more time studying his opinions than I have, although my staff has spent a great deal of time analyzing them.

I am really interested in the comparison, Ms. Hernandez, that you make regarding the privilege and immunities clause of the 14th amendment and the equal protection clause. I specifically went to Judge Thomas, when it was my turn, and asked him whether or not he accepted, understood and would follow the three tests used by the Court under the equal protection clause of the 14th amendment. We discussed the three and the heightened scrutiny test, and he said yes, he understood it, that it did apply to alienage, as well as gender, and yet that doesn't satisfy you, is that correct? And can you make the distinction why, if he accepts those three standards, that the question of undocumented aliens would not fall into that intermediate scrutiny, assuming that we can believe him that he does accept that, that is what he told us?

Ms. HERNANDEZ. Well, there are two points. One is that the Constitution does distinguish, even if you just take the equal protection clause of the 14th amendment, there are distinctions in coverage between a citizen, a legal resident, and very few benefits to an undocumented person.

What we are really talking about is the difference between citizens and legal resident aliens, and the Court has spoken on those issues. In granting certain rights to legal resident aliens, they did not give the strict scrutiny, they found an in-between.

Senator DECONCINI. Yes, they found the intermediate scrutiny, right?

Ms. HERNANDEZ. That is assuming that you accept the equal protection clause. The problem that we have is in reading Clarence Thomas' writings, he would hold the privilege or immunities clause supreme and paramount above the equal protection clause, and if his legal philosophy and constitutional philosophy is that and you carry it in a consistent manner, it is very clear what it says.

Senator DECONCINI. Yes, and that is partly from his article in the Harvard Journal of Law and Public Policy, is that right, the article that he wrote in 1988—

Ms. HERNANDEZ. Yes.

Senator DECONCINI [continuing]. Entitled "The Higher Law Background of the Privilege and Immunities Clause of the Fourteenth Amendment." Is that where that comes from?

Ms. HERNANDEZ. That is part of it.

Senator DECONCINI. I did not get into the distinction here that you make, and I appreciate it, but I did go to the 14th amendment equal protection clause, and I was satisfied, whether you agree

with him anyplace else. This is because he recognized the three tests, and particularly the intermediate scrutiny test and that it applied to aliens. I didn't ask him if it applied to nondocumented aliens, but the question was aliens, and maybe I should have been astute enough to be more precise, nevertheless he accepted that as a given in our constitutional interpretation and had not only no quarrel with it, he supported it.

So, I came away, quite frankly, far more satisfied than I did when Bork for a long time failed to recognize the three tests, until the Senator from Massachusetts finally got him to change his position, I thought. To me, this man did satisfy that, but the distinction you make, I see it, but I cannot agree with it. I just don't understand how you can make that fine distinction, when he clearly said that he accepted the intermediate scrutiny for aliens.

Ms. HERNANDEZ. The distinction I would like to have made is not so much as to the Equal Protection Clause, but as to what he believes should be supreme with the Fourteenth Amendment, the Equal Protection Clause or the Privilege of Immunities, because if, in fact, he believes it is the Equal Protection Clause, then your questions and his answers follow, as he is talking about that specific one.

Senator DECONCINI. Yes.

Ms. HERNANDEZ. If it is the privilege of immunities, and he says that I would argue that—if he were to argue that the privilege or immunities clause should be supreme, then whatever his views are on the equal protection are irrelevant.

Senator DECONCINI. And your point is in the article he makes that argument?

Ms. HERNANDEZ. Yes.

Senator DECONCINI. And so, based on that article, not on his testimony here, you conclude that his view, if confirmed on the Court, will be that the privilege and immunities clause is supreme and, therefore, the equal protection clause and these three tests would fall as it deals with aliens, that is your position?

Ms. HERNANDEZ. Exactly.

Senator DECONCINI. OK.

Let me ask any member here, I have struggled with this a great deal, as I struggled with Bork. I don't think anything is more important than what we do here, and we may make mistakes, as you all thought we did on Souter, but I struggled with that one and I struggled with Bork.

I gather, from looking at your testimony here, you compare Judge Thomas' judicial philosophy with that of Robert Bork, is that correct, or am I incorrect? Does anyone want to say that is not—do you consider him of the same philosophical bent, Mr. Rauh or Mr. Chambers?

Mr. RAUH. I will try to answer that. I don't think you can say that the thing is the same, except if you want to mean how far to the right have they gone, because they have gone in different ways.

I bet I am the only person in this room that has read Bork's book that came out afterwards. Have you read it, Senator?

Let me say what I think. He has very strong views, but he wouldn't necessarily be the same as Thomas. For example, in the book he takes the position that the only real self-restraint of a

judge is not the Frankfurter restraint that you hold the statute presumptively constitutional, he says that isn't his restraint. His great restraint is simply that a judge has got to say no in certain circumstances. In other words, I think if you try to compare—

Senator DECONCINI. It is not a matter of degree and area.

Mr. RAUH [continuing]. If you try to compare the two, don't do it on some specifics. I think if you want to go back over that book with me, you will find that in specifics it is different, but in general attitude I think you would find they are very similar, and I think—

Senator DECONCINI. Ms. Hernandez, you said in your statement that they reveal an ideological conservatism which differs little from that of Judge Bork.

Ms. HERNANDEZ. Yes, and what we meant in that is that a certain set mind and view of the world, notwithstanding his testimony, and if you look at the latter part of my testimony, we review his statements during the last 5 days, that he has very strong views on the world, on life and how he views the world, and I think it is unreasonable to expect or ask of a person, notwithstanding what happened here, that that person is going to change.

People that go into the courts do not change, you don't want them to change.

Senator DECONCINI. Thank you. I know that my time is up. Thank you. I just want to note that, you know, unlike Bork, Thomas stated that he recognizes the right of privacy as a constitutional right. Bork didn't recognize that. I find that a big distinction. Maybe you do not, but I find that a big distinction.

He comes up with the three-tier test in the equal protection clause of the 14th amendment. Bork had real problems with that, under careful scrutiny from a number of us. So, I see a great difference. I still respect your feelings that he should not be on the Supreme Court, but I see a great difference between these two.

My last comment, Mr. Chairman, I wonder, really, if the panel thinks that President Bush could appoint anybody that you would support. Based on President Bush's very strong conservative bent and philosophy, it appears to me that, you know, you have to take what you have, and we might do this for months and months, if we turn this one down, because I do not see any movement on the President or any indication that you are going to see somebody a whole lot different.

Mr. RAUH. Let me say in answer to that, may I please, Senator—

Senator DECONCINI. It is more gratuitous than anything else.

Mr. RAUH [continuing]. That there is a difference here. If this nominee were turned down, the threat often used on us is, well, you will get somebody worse. Well, there is precedent for beating the second person and getting somebody much better, and the precedent is Haynsworth, Carswell and Blackmun. We got a very excellent judge by the fact that the Senate, in its wisdom, turned two persons down.

I do not believe the President, as a matter of politics, is going to take it on a third time. I think if President Nixon had to appoint a Harvard *summa cum laude* with moderate views in Blackmun, I think President Bush would not want a third struggle. The ques-

tion is is this Senate ready to turn down a Thomas and someone of that ilk. I think the third time would be the charm, as it was in the Blackmun case.

Mr. BUCHANAN. Mr. Chairman, can I respond? You know, members of this committee have repeatedly expressed something of a redemption theory in terms of Clarence Thomas, notwithstanding his writings, because of his origins, because of what he said about a different attitude if he reached the Court, that he would be different.

And I want to express a redemption theory so far as the President is concerned. I think many of us who are concerned about such things believe that the Federal judiciary over the last 10 years has been filled with ideological conservatives to an extent that Franklin Delano Roosevelt never dreamed of, on the other side.

I think—I can't prove it sitting here, Mr. Chairman, but I think there is significant evidence that that process has taken place in the Court itself, and its sea change in 1989 would reflect that change.

The President is replacing the towering figure of Thurgood Marshall, truly an exclamation point. He appears to have done so with someone who is a long series of question marks. He could decide to attempt to replace a Thurgood Marshall with a towering figure. The Court already has a strong conservative leaning. But think of the strength he could give the Court, and think of what it would mean to the President in terms of statesmanship in terms of history if he were to decide, wait 1 minute. Maybe we have done enough of this. Maybe it is time to truly look through that large pool of, yes, black Americans who might be persons of more clearer stature, longer experience, clear track record, and decide to make an appointment that is truly statesmanlike.

Senator DeCONCINI. You have a lot more faith in President Bush than I do, Mr. Buchanan, I must say.

Mr. BUCHANAN. Well, it is the redemption theory, Senator.

Mr. CHAMBERS. May I briefly respond to that too? And first going to the question by Senator DeConcini about the similarities between Judge Thomas and Judge Bork.

I think, as Mr. Rauh mentioned, they may differ in some areas or in some degrees, but I think the adamancy and the position that they are advancing and the unwillingness to look at approaches that are necessary in order to provide some meaningful relief, as in the race area, they are pretty much together.

And I think it is pretty clear from Judge Thomas' writings, speeches and action that he would come out in a sitting with the Court that would be at odds with many of the precedents that the Court has adopted.

But finally in that connection, on the equal protection clause that you are talking about, one also has to remember that there are three tiers, and one of those tiers provide very limited relief. And, in the alien situation there is a real problem in terms of the kind of protection that is there.

And finally, I think when we look at a candidate like this we make a decision on the basis of the qualifications of the candidate. Regardless of what the President may do tomorrow, we are faced now with a candidate.

Senator DECONCINI. I agree.

Mr. CHAMBERS. We have to make a decision whether he is qualified for the position.

Senator DECONCINI. That is a fair point, in my judgment.

Thank you, Mr. Chairman. I am sorry to take as long as I did.

The CHAIRMAN. Thank you. With the permission of my colleagues, I would like to just follow up.

Mr. Rauh, you said earlier that, something to the effect that there should be balance on the Court, and you pointed to the Roosevelt era and you mentioned Hoover, pre-Roosevelt, you mentioned and Calvin Coolidge and who they appointed.

Do you think you would be here if the Court had six liberals and the President nominated Judge Scalia, knowing what Judge Scalia thinks and how he views the world? Would you be here supporting or opposing Judge Scalia?

I have never heard anybody talk about Judge Scalia's qualifications. I have incredible difficulty with Judge Scalia's methodology, personally. But I never heard anybody talk about his qualifications as being in jeopardy.

Would you be here opposing Judge Scalia? It is a tough hypothetical, but.

Mr. RAUH. I don't think the exact case has ever come up, but it may have. The reason I say I don't think that the exact case has ever come up, it hasn't come up for liberals. I think it came up for the Republicans in the Senate in 1932. The conservative Republicans in the Senate, I think they had that, because you had a conservative Court in 1932 and you had a liberal appointed, which is the exact opposite of the case you gave me.

The CHAIRMAN. Yes. That is why I asked the question.

Mr. RAUH. And I think the Republicans in that instance acted with great dignity. Indeed, Senator Watson of Indiana—am I right?

The CHAIRMAN. I don't know.

Mr. RAUH. I think he was the majority leader. And he said to Hoover, "The best appointment politically is the best man," and, in fact, a liberal was confirmed there.

I can't—I want to give you an honest answer about Scalia there. I think I would feel that that was a pretty bad appointment. But I really think if there were six liberals this panel wouldn't be here.

The CHAIRMAN. I appreciate that.

I am sorry. The Senator from Pennsylvania, I believe, is next.

Senator SPECTER. Thank you, Mr. Chairman.

Within a short round, it is hard to cover much ground that this very distinguished panel has articulated in both the written statements and their oral testimony. Let me start with the qualification and background issue that Mr. Chambers writes about. And he lists a litany, one of which is the ability to grasp the intricate relationships and ramifications of a decision that is an integral part of the mosaic of Federal law, one among many qualifications. And he compared Judge Thomas to 48 Supreme Court Justices appointed in the 20th century and find him coming out lacking.

And, I wonder as I go through it if any really measure up except for the two that Joe Rauh talks about having clerked for—Benjamin Cardozo and Felix Frankfurter. And I think back on the testimony given here, Chief Judge John Gibbons from the Third Cir-

cuit, a very distinguished jurist who knew Judge Thomas for many years, or they sat on the board of Holy Cross and had some detailed of the individual and his legal qualifications, read all of his opinions before coming to testify. And you had Professor Drew Days of the Yale Law School who, although he opposed Judge Thomas, thought he was educationally and intellectually qualified. And then you had Dean Calabrese of the Yale Law School who was at Yale in the teaching field, although he did not have Clarence Thomas as a student when he was at Yale, and all of those individuals give him pretty high marks in terms of base qualifications.

Why should we not accept their approach, Mr. Chambers, as opposed to your analysis?

Mr. CHAMBERS. Well, first of all, Senator Specter, I listened to some of that testimony and I am not certain how high a mark they gave him, but let's make that assumption. But I ask you to look at the Justices we have listed here in this exhibit, at the litigation experience or practice of law experience, at the teaching experience, at the judicial experience they have had, at the status they had obtained in the legal field, and make a comparison with Judge Thomas.

I think if one wants to look at the Constitution and talk about what the standard is as what we have developed to judge candidates for the bench for, and in that instance I think the ABA said that Judge Thomas was qualified.

But, if we are trying to develop a Court, or preserve a Court that has been responsive to the issues that have been brought before it, that had people who were really exceptional as we collect here in this exhibit, Judge Thomas doesn't measure up, and that is what we are presenting with this exhibit.

Senator SPECTER. Well, you would disagree with Dean Calabrese who said that he at least may not measure up to the Cardozo-Holmes standard, but Dean Calabrese insisted that he at least measured up, if not better than, the other recent appointees.

But you would disagree with that as well?

Mr. CHAMBERS. Again, I would call your attention to this exhibit, and according to this exhibit and looking at the objective standards we are trying to use in the exhibit, the answer is no.

Senator SPECTER. Well, your exhibit picks seven standards, but you might pick some others. You might pick a totality. But I would be interested in the answer to that question as to your agreement or disagreement with what Dean Calabrese said, that Judge Thomas is at least as good as the recent appointees.

Mr. CHAMBERS. As the recent?

Senator SPECTER. Appointees to the Supreme Court of the United States.

Mr. CHAMBERS. If that is what Dean Calabrese said, I would think that that is not the way I would evaluate Judge Thomas' qualifications.

Senator SPECTER. I would like to discuss a number of the areas with you, but the yellow light is on, so let me instead turn to Mr. Lucy on one question.

Mr. Lucy went to the Yale article which Judge Thomas wrote, the Yale Law and Policy Review, and picked out his writings on Judge Thomas' disagreement on affirmative action. I note there

that Judge Thomas has opposed affirmative action most of the time, except to a very limited extent on preferences in education, and he has opposed the class preferences because he says that for the minorities whom they benefit—and this is what you had read—they foster the view of disability or being in need of handouts, and for the individuals who are being replaced they promote a feeling of being replaced by someone who doesn't have as high test scores. And then he emphasizes the point of increase on racial divisiveness. Those are in the context of footnote 3 that you cited.

Now, whether or not you agree with his conclusion that affirmative action is undesirable, when you take his reasons for being opposed to that, would you not say that there was at least a reasonable basis for his conclusion?

Mr. LUCY. I think, Senator, if you look at what the serious problems are that caused the establishment of EEOC itself and some of the provisions of the law, the question of whether affirmative action is designed to bring about remedies or designed to prevent others from being injured, Mr. Thomas placed more emphasis on the issue of reverse discrimination than on carrying out the mandate of his agency. And whether or not he had a reasonable basis for that judgment may well be true. I can't say what was the basis of his concern.

But the basis of my concern, and for millions of other workers, is that there be some process by which fairness can be brought to those who have been disadvantaged by systematic discrimination, and the charge of EEOC it would seem to me is not only to promote affirmative action as a remedy for past discrimination, but also to be fair in providing remedies where it has been established that there has been injury to groups.

My reading of Mr. Thomas is that it was defensive of (a) the individual injury to individuals, and a defense against reverse discrimination.

Senator SPECTER. If I just might make one comment in closing, because my time is up. Not saying that I agree with Judge Thomas, but I think he does more than focus on reverse discrimination. He focuses very hard on discrimination. He has said some very powerful things about believing that discrimination was as bad in 1987 when he made his speech as it was when Chief Justice Taney decided *Dred Scott*, but he deals with discrimination on an individual basis. And when he comes to the group action he finds as a policy decision these factors which lead him to a contrary conclusion.

Mr. LUCY. Well, Senator, I would only say that these provisions were not put into the law just sort of willy-nilly. There was a great deal of discussion, debate, and I am sure thought by those in the Congress who, in fact, enacted the legislation, and I am sure they concerned themselves with the possibilities of others being injured as a result of, not preferential treatment, but really affirmative action to correct past wrongs.

Again, I think this is much more of an instance of Mr. Thomas assuming and asserting his judgment as opposed to the intent of the law to start.

Senator SPECTER. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman. First, I welcome the panel and I thank you for your testimony. Just a few comments and then a general question. If you were to list who were the giants in the field of civil rights and civil liberties in this century, Joe Rauh would be one of them, and when Joe Rauh tells that today—and I think you are saying that no matter what happens with this nominee—the keeper of the Bill of Rights is Congress, I think that is something we have to weigh very, very carefully, and I believe that to be the case.

In commenting on my colleague Senator DeConcini's comments that he can't imagine George Bush nominating someone with differing views, it is interesting that every Republican President, from Calvin Coolidge through Gerald Ford, has nominated a Supreme Court Justice with views more liberal than the President. And President Kennedy nominated Justice White, and Harry Truman, who certainly wasn't short on strong views, nominated a Republican Senator from Ohio, Justice Burton.

So this idea of balance on the Court and that the Court and the law should not be a pendulum swinging back and forth has some historic precedent.

Ms. Hernandez, I think the point that you make on privileges and immunities is important. The Constitution in a great many places makes distinctions between persons and citizens, and we have had court decisions that are not good court decisions because we have not recognized the rights specifically of people who are here legally. I think of the action taken when we were involved with Iran and the hostages were taken, where I think an unfortunate decision was made by the appellate court.

And then finally this is my question to all of you. I recognize that there is a difference between Judge Bork and Judge Thomas in terms of the basis for arriving at decisions, natural law being one, the area of privacy, for example, being another.

But my question to each of you would be this: Judge Bork, who was turned down 9-5 by this committee—can you think of any specific decision of the Court where Judge Thomas might have voted differently than a Judge Bork would have voted had either been in the Court?

Mr. RAUH. Well, there is a basic difference between their views on self-restraint. I didn't say it very well when I was talking about their differences before. Judge Thomas believes, he says, in self-restraint, but he doesn't believe in original intent. Judge Bork—and that is why I mentioned the book—says in the book the only restraint that matters is original intent, which is, I think, ridiculous, since the greatest exponent of self-restraint, Justice Frankfurter, was not a believer in original intent.

So they do have differences in their purposes and in their principles of constitutional interpretation. They may come out the same way, but they do have a substantial difference. One says self-restraint; the only thing that matters is original intent. The other says, no, it is a withholding of your views as against the views of the Congress. And so I would say there are differences, but as Mr. Chambers pointed out, they are small differences and they would most times come in the same place.

Senator SIMON. And I would be interested in hearing from the others, but if you take one view of privacy and another view of privacy, whether the Constitution has it, but you come out the same on *Roe v. Wade*, the net result for the American public is the same.

Mr. BUCHANAN. I think it is very important, Senator. I think in terms of a fundamental threat to our liberties, the rights and liberties of the American people, it ends in the same place. They may have differences in philosophies, but the mind set or at least the gamble the Senate is taking with the rights and liberties of the American people is very troubling indeed.

And may I add one footnote on affirmative action, since it has been such a subject throughout these hearings? We white males, like me and like every member of this panel, have had an affirmative action program going for centuries. We have had preferences that we have enjoyed for centuries throughout American history, and it is only very recently in this century that we have gotten around to extending some affirmative action, or at least some redress to black Americans, to women.

One specific example is the Vietnam war. That was a wonderful affirmative action program. The sons of the rich and the powerful, in preponderance, were able to get into the guard and the reserves, and I was here and I well remember, and I think that can be clearly documented. The people who had to go to Vietnam and fight and kill and be killed were disproportionately poor and minority.

Well, that is a different kind of affirmative action program, but if we waited for a case-by-case basis to redress historic injustices done to the black community in my State of Alabama and throughout the country and to women through the centuries, we would be to the year 2200 getting to first base.

If you can't have class action—blacks are discriminated against as a class in the United States, regardless of individual differences; women were here and many other places. If we can't deal with it on a class action basis, we can never solve the problem. So I find the danger to the liberties of the people just as great in one case as the other.

Mr. LUCY. Senator, if I can just add maybe an extension on the question of economic justice, be it for black males, black workers or workers in general, but particularly with regard to women workers—and while I don't want to quote Mr. Thomas out of context, at least his description of the economic question was when he made the statement that comparable worth or pay equity was loony tunes, sort of reflecting the fact that he does not believe that the value of work of women will ever equal the value of work that males contribute. And this by itself in 1991 is the critical issue confronting female workers in the workplace, and particularly as statistics show our society moving toward substantial numbers of single-headed households by women.

As I said in my testimony, any dollar denied them by gender-based wage discrimination is almost a denial of economic justice. And on that point alone, I think he is so far out of the mainstream.

Mr. CHAMBERS. Senator, for African-Americans, I was thinking really as you raised that question—I don't think in the race area that there would be very much difference in the outcome in decisions between Judge Bork and Judge Thomas. In fact, there is from

several of Judge Thomas' writings suggestions that he may come out worse in several instances than Judge Bork, and that is one of the concerns that we have.

As I indicated earlier, we have been before the Supreme Court now over our 51-year history over 500 times and we have gotten different results coming out of there, and most of those cases now would be questioned by Judge Thomas, as made clear by his writings and comments.

So I don't see that much difference in the outcome and, in fact, I would be more concerned that Judge Thomas would come out more adversely to the causes that we are raising than Judge Bork.

Senator SIMON. So if I may follow through, it would be, in your opinion, inconsistent for me to vote against Judge Bork and for Judge Thomas?

Mr. CHAMBERS. That is quite correct.

Senator SIMON. Thank you all very much. Thank you, Mr. Chairman.

The CHAIRMAN. Now, I have a few more questions, as does my friend from Wyoming, is that correct?

Senator SIMPSON. I do, Mr. Chairman.

The CHAIRMAN. Let me ask my question; I actually have one question. I thought the most compelling testimony that we have heard today—we all have a different view; it is subjective, obviously—was the testimony of Faye Wattleton and Kate Michelman this morning.

I am wrestling with what you all have said in one form or another, the issue of credibility. You have all either said it directly like the Congressman has, or indirectly like Ms. Hernandez has. She is obviously going to be Secretary of State in somebody's administration. [Laughter.]

I am trying to be as precise as I can be because, Mr. Chambers, I don't think there is any correlation between Judge Bork and Judge Thomas in terms of their methodology. They may come out the same place, but they are fundamentally different.

As a matter of fact, as Mr. Rauh can tell you, in Mr. Bork's book he reserves an entire chapter for people who think like Judge Thomas, talk like Judge Thomas, use the rationale Judge Thomas does for his brilliant ridicule, and he is a brilliant fellow and his ridicule is real and it is compelling.

Judge Thomas—everything he has said and written is a rejection of the positivist view of the Constitution. So I don't see how anyone can possibly say they are in any way related in terms of how they approach interpreting the Constitution.

Mr. CHAMBERS. The question, though, was whether there would be any different in the results of the decisions.

The CHAIRMAN. I see, OK, but we don't have a disagreement, do we, on from whence they begin their analysis as being so fundamentally different? I mean, they are as different as any two nominees. I have been here not that long, 19 years. I have been here for a while and I know of no two who have evidenced a view that is so diametrically opposed.

The words "natural law" do not emanate from the lips of Judge Bork. I mean, it never even—you know, it is the ultimate legal sacrilege, if there is such a thing.

Mr. CHAMBERS. Senator Biden, the question again goes to the second point that I was trying to raise in the testimony about the qualifications of the candidate.

The CHAIRMAN. That is what I want to get to.

Mr. CHAMBERS. OK.

The CHAIRMAN. OK. That is what I want to get to in my question. Now, I want to stick, actually, with the question of credibility first. One of the arguments Judge Thomas raised, one of the statements Judge Thomas would counter with, I say to Mr. Rauh and all of you, whenever I would press him on any of the number of speeches that he made—and I think I have read as many as anyone in this room, including my staff, and I know they have read all of them.

He would say something along the following lines: well, if I wished to say what you are asserting, I would have explicitly said it. For example, in the Lehrman quote, in the footnote that he refers to, in the Cato speech where he says, do you want to understand why I criticize *Roe*? Go look at my—and then he goes back and there is this labyrinth he takes you through. I wondered whether he ever wrote the footnote or someone else wrote the footnote for him. I don't say that critically. A lot of footnotes are written for a lot of people, including Justices.

You wrote a hell of a lot of footnotes, Mr. Rauh, for brilliant Justices, I suspect. I do not suspect they were brilliant; they were brilliant, but I suspect you may have written some of those footnotes.

Having said that, how do you respond to the assertion by Judge Thomas that "If I wanted to criticize *Roe*, I would have criticized *Roe*. Why would I not have just criticized *Roe* way back in 1981 and 1982 and 1983? Why didn't I just say by the way, this is not just a splendid example of the application of natural law; this is also a view held by Mr. Lehrman that I believe is correct, and I think *Roe* is a wrongly decided decision, and I think it should be overturned"?

Why would a man like him have not said that 6, 8, 9 years ago when he was making some of these speeches—not all of them; some of them are as late as 1987, 1988—why would he not have done that?

Ms. HERNANDEZ. Well, let me try—

The CHAIRMAN. But you know him, so maybe I'll start with you, Madam Secretary.

Ms. HERNANDEZ. Let me try by saying that most of his writings, his speeches, centered around his chairmanship of the EEOC and battling those issues and speaking on his philosophy and point of view dealing with the matter at hand.

Some of his articles and speeches when he left the area of affirmative action or where he left the area of his views when he was with the Department of Education, and he commented on an article that he liked in the speeches that he made, it was that indirect comment. I think that it was lack of opportunity as far as his ability to speak on the many issues of the day. He was preoccupied, and his hands were full with the issues at hand.

But we listened very carefully to his testimony, and if you listened very carefully, and particularly a couple of times when you tried to push him, even when he conceded on certain policies, and

we were very careful in his response—in fact, let me give you an example on the legal position on his testimony to Senator Specter, dealing with goals and timetables, and you got some comments there.

He sort of conceded in his response that such policies might sometimes be okay, but only from a policy point of view. He declined to give even his tentative approval from a legal perspective which is what he was going to be called to deal with as a judge and has been called to deal with as a judge. And when he conceded when pushed, it was from a political point of view.

The CHAIRMAN. Well, I understand that—and I know my time is up—but one of the things that I'm trying to get at here is to try to deal with some precision about what he did say and what he didn't say. And there is no question—in my view, there is no question—that there was an overwhelming effort on the part of Judge Thomas, I suspect—I'd be willing to bet anything—at the direction of the White House not to answer anything about the law, period, if you could avoid it—anything. That's one issue, whether or not we should "allow a nominee to get away with that", quote-unquote, and that is something we are going to have to decide as a matter of policy here in this committee.

But that is not the same as saying that because he didn't speak to the law, his views on the law are able to be clearly arrived at by this panel or anyone else listening from what he didn't say.

Ms. HERNANDEZ. That's true.

The CHAIRMAN. So that's the only point I'm trying to make sure—I have to deal with, in determining whether to vote for or against him, his credibility in terms of whether he is telling me what he is thinking; whether or not we should, at what point, is this the time—we keep changing the standard as we go, legitimately, in my view—that is, as more nominees stonewall, this committee, at least some of us, get more upset about the stonewalling, for example. Justice Scalia answered nothing at all, zero, zip, nothing. Two members of this Committee said, "Oh, no, we're not doing that again." Each nominee is answering a little more. Whether they answer enough or not is a different question.

I'm trying to focus on what he said in his writings, and as I looked at every one of them, the worrisome passages of all of his speeches have been throwaway lines or paragraphs, almost all of them without any connection to the subject matter of the speech, almost without exception.

Now, the privileges and immunities speech by itself is something to worry about on its face, and you made that point very well. But all the lines we have heard so much about today—not today, but that I have raised; I think I was the first one to raise them—all of them are in the context of a single paragraph dropped at the beginning or the end of a speech unrelated to the paragraph.

When I questioned him at length about Professor Epstein, what worried me most about it after I listened to him wasn't that he agreed with Epstein, but that he didn't know what Epstein was saying.

So—and I'm going to stop talking here—but you understand the dilemma that I have and that I want you to speak to, and that is that the man said, look, if I wanted to say Epstein's notion of the

fifth amendment and the takings clause was correct, why wouldn't I have gone on one more paragraph and said it? If I wanted to make the case that Macedo was right, why would I have quoted Macedo the way I did and then spent a significant portion of the speech pointing out that Macedo had gone too far? If I wanted to make my point known on *Roe*, why would I have complemented, for any reasons other than I stated, this splendid application of natural law by Lew Lehrman in Lehrman Hall of the Heritage Foundation and then never again mention abortion?

Is it that this man 9 years ago thought, "I want to get to the Supreme Court, and I'd better not say anything"? Could he have been that—how can I say it—optimistic about his future?

Mr. RAUH. No, that isn't the point, Senator. You are making a good point, but I think you are wrong. I think the words "splendid application of natural law" are a statement of fact, and if you—

The CHAIRMAN. Let's assume they are, Joe, for the sake of discussion.

Mr. RAUH. Let me go on, please.

The CHAIRMAN. Sure.

Mr. RAUH. If you were making a speech to someone, you wouldn't use those pedestrian words—"I think we ought to overrule *Roe v. Wade*." That's not the way a speech is constructed. It is constructed in a way that—

The CHAIRMAN. That's the way he talks in his speeches, though.

Mr. RAUH [continuing]. There is a certain elegance which, if you are a natural law freak, as he was at that time—

The CHAIRMAN. I am one of those natural law guys, you know—I think, by the way, Frankfurter was, too.

Mr. RAUH. I'm not saying what he said here; I'm saying what he said there. To say that's a "splendid application of natural law" is the best way to say the overruling of *Roe v. Wade*. He said something worse, though, because if that memorandum was right, then abortion is murder, and maybe he didn't want to go quite that far. But if you start parsing it and saying, "Oh, I am for the repeal," then the next question will be, "Well, are you also for the other half of this memorandum, which says abortion is murder?" I just—

The CHAIRMAN. Well, at least you admit it raises the question that he might not have been for the whole memorandum. The only point I am making is that it doesn't seem clear because he is very explicit about other things he says. He is very explicit when he talks about issues relating to affirmative action. He doesn't mince words in his speeches. He is very explicit about the privileges and immunities clause. He doesn't mince words.

And I am in a quandary, a sincere quandary, as to why, if these phrases were as troublesome as they could be from my perspective, why he didn't—one of the things he said to us was, "Look, if I meant to say it, I'd say it." He said it other places. I don't know whether that is compelling, but at least it has me thinking, and I wondered.

I've got to yield now to my colleague. But I want to point out that when I was talking about natural law in Bork, you all were applauding. I want to remind you all of that. When I talked about I derive my rights not from a piece of paper, you all thought that

was pretty good back then. So all of a sudden, natural looks like it's just a matter of how you apply natural law and what your framework is, from my perspective. But at any rate, you all thought that was pretty good back then to take on Bork's positivist view that there was no such thing as unenumerated rights—"you all" I use in an editorial sense; not any one of you in particular.

With that, let me yield to my colleague from Wyoming.

Senator SIMPSON. Mr. Chairman, I do indeed remember that, but I can understand your frustration because it was a different reception to those remarks.

But just quickly, we want to get on, and I have not delayed the issue; I've taken just maybe 20 minutes all day, but I'll take these 5.

It really is fascinating to me to hear this continual reference to the word "balance"—balance, balance, balance. It is my opinion that no nominee could ever pass your test of George Bush, and I wouldn't be too sure about the views of Clarence Thomas and George Bush and where they'll end up when it's all up on the scorecard. I wouldn't go into that one at all.

But I don't think any nominee could be both conservative and the best person in your view, period. That's the way it is, and we'd just as well maybe start from there. But if you really do believe in balance—and you said you did—what about the balance in the U.S. House of Representatives where, under the remarkable preponderance of Democrats, nearly all of my life there has been no balance whatsoever? How about a little balance there?

Does anyone—I'm sure that's an absurd idea, but I just thought I'd throw it in. We have an abused minority over there called Republicans. Don't you think it would be good to unleash them and allow them to have a little staff and do the other things that other people get to do in society, and that is produce papers and writings, and it's called "balance".

What do you think of that absurd and totally nutty idea?

Mr. RAUH. Well, it's only nutty because of the fact that one is an appointed body and the other is an elected body. The appointed body, it is easy to have balance. The elected body, it is much harder to have balance.

Senator SIMPSON. Well, Joe, I would say—and I know you have a bit of disregard, I would say, for Presidents Reagan and Bush—they went out and told the American people when they ran, as they campaigned for President, that if they were nominated and elected that they would nominate judicial candidates who shared their views. That's exactly what they said when they were out on the stump. They were elected, they made the appointments, and they were reelected based sometimes on those appointments. So that's the way that is, too.

Mr. CHAMBERS. But the Senate didn't run on that same platform, and the Senate has a constitutional responsibility as well.

Senator SIMPSON. Of course.

Mr. CHAMBERS. So when the President makes his nomination, one hopes that the Senate exercises its responsibility.

Senator SIMPSON. Well, I think we have. I have been here under Presidents of the Democratic faith and the Republican faith, and I don't think I ever got tangled up in any judge of Jimmy Carter on

any issue except were they competent, capable, had judicial temperament, and so on. This is bizarre. This guy is a conservative. You don't like him—

Mr. RAUH. Jimmy Carter didn't have an appointment to the Supreme Court.

Senator SIMPSON. I know. There were many judges that Jimmy Carter appointed to the Federal district court, and some I helped get through, to the detriment of my own party support.

But I think there is one that has to be settled, because I have heard Mr. Lucy now speak several times on this issue of women in the workplace. Let's get to that.

On page 11 of your testimony, you speak of Judge Thomas' "disturbing record on women in the workplace". That is your quote. Then you give an example of his record, and you say the following: "the EEOC under Judge Thomas' leadership rejected the concept of pay equity, eliminating the hopes of many women in seeking comparable pay with their male counterparts."

Now, every one of us in Congress knows that "pay equity" is a euphemism for "comparable worth". The comparable worth doctrine attempts to intervene in the marketplace and decides that nurses and truck drivers, for example, ought to be equally paid, with absolutely no attention at all paid to supply and demand or to other relevant economic and social factors.

My question is this. You speak of Thomas' criticism of comparable worth as if this were a mainstream, well-accepted concept, this comparable worth. And yet most Federal courts have been absolutely unwilling to extend title VII to cover comparable worth claims. We have case-after-case in the Federal court rejecting comparable worth—not just Clarence Thomas. Let's get serious here. The following cases have rejected comparable worth's validity under title VII of the Civil Rights Act: *Christianson v. Iowa* was the eighth circuit; *Lemons v. City of Denver*, the tenth circuit; *Spaulding v. University of Washington*, the ninth circuit.

Aren't you really, honestly asking Judge Thomas to endorse an agenda of yours which is already shown to be out of the mainstream by every court that has yet dealt with it?

Mr. LUCY. Well, Senator, that's not quite true, I think, and while I don't know every specific case you cited, most of the opposition to comparable worth flows from the economic consequence of in effect supporting it.

What we have, and particularly at State and local Government levels, and particularly within the marketplace, is systemic discrimination against female workers.

Second, you've got the notion, appearing to flow from Mr. Thomas' own comments, that women make employment judgments on the basis of family life as opposed to the need to work.

Comparable worth and the evaluation of the relevant value of jobs—there is a procedure that can supply the proper analysis. And if that analysis is justified, then support of it and decisions supporting it ought to be justified. I don't know the cases you cited, but by and large the resistance is the resistance to change to make economic justice in the marketplace for female workers a reality. And whether it is Mr. Thomas or even the courts, the fact is systematic

discrimination exists against female workers in the workplace, be it the public sector or be it the marketplace.

Senator SIMPSON. Well, I am just saying to you that comparable worth is so complex, so difficult to deal with—

Mr. LUCY. So is discrimination, Senator.

Senator SIMPSON [continuing]. That the courts haven't decided to do it at all. It can't be dealt with.

Mr. LUCY. But that's the point.

Senator SIMPSON. Well, the point is that to put that all on Judge Thomas, eliminating the hopes of women, you have to talk about every other court and talk about us—we can't deal with it. Comparable worth in this body would be like an impossible dream to figure out what to do with comparable worth. We all agree that women should have these rights. Who challenges that? It's trying to put it together—

Mr. LUCY. But Senator, could we not have found a different way to describe it? I mean, Mr. Thomas' comments of "loony tunes" does not quite reflect—

Senator SIMPSON. What did you say?

Mr. LUCY. His comment was that the concept was "loony tunes".

Senator SIMPSON. Well, there are a lot of Congressmen who feel the same thing about comparable worth, that it is "loony tunes", but there are a lot of them who think that women should have the same equity in pay as men, but they don't know how to get to it, and they can't get it through this crazy business of whether nurses and truck drivers and not paying attention to the other issues can't even be decided. It can't, or we'd have done something about it long ago. And they tried.

But finally, many people have asked why do these judges, these potential nominees do this. Why are they mute? Why do they duck these questions? That answer should well be understood after what happened to Judge Bork. Who can even challenge that? The man was on the bench for 5½ years, and I never heard a single comment about his 5½ years on the bench while I sat here for days. All I heard about was some goofy Indiana Law Review article written in 1971, and I had to watch that and then to watch the advertising that came in the face of this man, and see where it came from—powerful, hysterical, extraordinary national television, irresponsible beyond comprehension. And you are wondering why nobody is going to say anything. I have a thought for you all: Stop smearing them, stop ridiculing them, stop tearing their past lives to shreds and their past comments to shreds, made when they were 10, 20, 30 years back down the line, and they will start talking. Until then, they won't—and who would?

Mr. RAUH. Is that a question?

Senator SIMPSON. That's not a question.

The CHAIRMAN. Are you finished, Senator?

Senator SIMPSON. Yes, I am, all finished, for the day, or for a while. I may rise again.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I just want to welcome you distinguished people to this hearing. We thank you for your presence. I have no questions.

The CHAIRMAN. Thank you.

Folks, thank you very much. We appreciate it. It was very enlightening.

Mr. RAUH. Thank you very much.

[Pause.]

The CHAIRMAN. The committee will come to order.

I am sorry—I kept you waiting because I was waiting for the fourth panelist, who I am told is not here now.

Our next and patient panel is made up of Dr. Julius Becton, Jr., president of Prairie View A&M University. Welcome, Doctor.

We welcome also Dr. Jimmy Jenkins, chancellor of Elizabeth City State University, and Yvonne Thomas of Zeta Phi Beta Sorority.

Welcome, all three. We are anxious to hear what you have to say. Obviously, our interest in the previous panels is one of the reasons why we are as late as we are, but we are here to hear what you have to say, and we will stay here. So we appreciate very much your patience.

Have you concluded how you would like to begin, or should we begin in the order you have been called?

Mr. BECTON. You are more senior than I am, you've got more tenure. What do you want to do?

Mr. JENKINS. I'll go first.

Mr. BECTON. I knew they'd do that to me.

The CHAIRMAN. All right, Chancellor, you begin, please.

**STATEMENTS OF A PANEL CONSISTING OF JIMMY JENKINS, CHANCELLOR, ELIZABETH CITY STATE UNIVERSITY, NC; YVONNE THOMAS, ZETA PHI BETA SORORITY, AND JULIUS BECTON, JR., PRESIDENT, PRAIRIE VIEW A&M UNIVERSITY**

Mr. JENKINS. Mr. Chairman, distinguished members of this august body, ladies and gentlemen, I am both honored and humbled by this opportunity to come before you and this Nation to voice my views on whether or not Judge Clarence Thomas should be confirmed as an Associate Justice of our Nation's highest court.

I am honored because this chancellor of a small university in North Carolina called Elizabeth City State University, which this year is celebrating its 100th anniversary, was selected.

The CHAIRMAN. Congratulations.

Mr. JENKINS. I am humbled because I realize that what I say here today may have some influence on your decision to affirm or reject Judge Thomas as the nominee with all of the ramifications your decision has for our Nation now and in the future.

I have come to express my support of Judge Thomas as the second such nominee in the history of America's highest court. Let me quickly say to you that my support of Judge Thomas is not based upon a personal association. Judge Thomas and I have never met. My support is not based upon a party affiliation, since I am a registered Democrat. My support is not based upon the notion that he and I agree on every aspect of the philosophies that have molded his character.

I am here this evening, Mr. Chairman and members of this body, because Judge Thomas is widely acknowledged for his philosophy

of self-help as relates to the African-American struggle for justice and equality.

As the leader of a historically black university and a representative of 117 HBCU's in this country, our very existence is a shining example of our belief in self-help. Education has always been America's trump card in dealing with its problems. From Sputnik to the age of computers to the sexual revolution, we have turned to our schools to provide solutions to complex problems.

One hundred years or so ago, when African-Americans were unable to attend historically white institutions, in the spirit of self-help, the HBCU's were born. Clarence Thomas has consistently expressed his admiration for HBCU's. In a speech given at Clark College in Atlanta, GA in 1983, he reiterated his support of HBCU's. Quoting from his speech, Thomas said: "I recognize that historically black colleges have produced 50 percent of the black business executives, 75 percent of the black military officers, and 80 percent of the black physicians in this country. Even though traditionally white institutions are now open to everyone, black higher education institutions produce more than three-fourths of the black graduates. I refuse to pursue desegregation policies which penalize black colleges. They were not the ones doing discriminating. Realizing the importance of the continuing contribution of black colleges, I approach enforcement with great care. I insist that the State plans have as a major objective the enhancement of black institutions. This means better libraries, better programs, upgraded faculty and more funds. In that way, equality of educational opportunity was best realized."

Historically black colleges and universities benefited from Thomas' support when in 1983, as chairman of the EEOC, he signed a \$42.5 million agreement with General Motors Corp. in the largest nonlitigation settlement in EEOC history, resolving hundreds of employment discrimination claims. Additionally, the agreement provided for more than \$10 million in endowments and scholarships to increase educational opportunities for minorities and women. HBCU's received almost 50 percent of the funds allocated, another example of Thomas' philosophy of enhancing these institutions.

If Clarence Thomas is confirmed as an Associate Justice of the Supreme Court, he may have an opportunity to participate in the high court's deliberation on the case of *Ayers v. Mabus*. This case threatens the existence of public HBCU's unlike any other case in recent memory.

As an Associate Justice of the Supreme Court, Clarence Thomas will have an opportunity to influence and to vote according to the position he espoused in 1983, and I quote again:

Within a month of taking that job, I was terrified by the possible effects of the desegregation efforts on black colleges. How will desegregation policies which ultimately eliminate black colleges help black people? They worked to keep those institutions alive and vital. Let us continue to do so.

The nomination of Judge Clarence Thomas is not just about the filling of a vacant seat on the High Court. This nomination is also about democracy. The New World Order that is evolving has as its catalyst the cry for democracy as nation after nation focus attention on America as the preeminent role model. If we are to truly

provide a meaningful example, we must come to understand that democracy is more than the right to vote, freedom of religion, freedom of the press, or even freedom of speech. If the spirit of our Constitution is to truly be embodied in our democracy, we must have fair representation in all aspects of our society. That includes all three branches of the government. It is through fair representation that our youth, coming from diverse cultural backgrounds, find role models and acquire the motivation for upward mobility. As an Associate Justice of the Supreme Court, Clarence Thomas will be that fair representation for African-Americans.

With a background evolving out of Pin Point, GA, which has been vividly and emotionally described by Thomas himself and others who were his peers, to assert that when the cases that offer an opportunity for redress of the ills of poverty and illegal racial discrimination are placed before him that he would be indifferent, vote to maintain the status quo, or even worse, seek to turn the clock back, I believe is ludicrous. We may be singing different songs, but we are all singing from the same hymnal.

Mr. Chairman and members of the committee, thank you for letting me share this moment in history and for the opportunity, as a scholar of a historically black university, to express my support for Judge Clarence Thomas, who has consistently expressed his support for HBCU's, to be an Associate Justice of the United States Supreme Court.

Thank you.

Senator HEFLIN [presiding]. Senator Biden is out of the chair, and I want to hear Ms. Thomas because I've still got things that keep competing with my time, and so if you don't mind, Dr. Becton, I am going to call on Ms. Thomas.

The light system is working, and if you can limit it to 5 minutes or we won't be out of here until 3 in the morning.

Ms. Thomas.

#### STATEMENT OF YVONNE THOMAS

Ms. THOMAS. Good evening, distinguished members of the Senate Judiciary Committee.

I am Yvonne Thomas, a lifelong resident of the great State of Alabama. I was born and reared in Mobile, AL. I received my undergraduate education at Alabama State University in Montgomery and received my master's degree from the University of Alabama in Birmingham.

For the past 27 years I have lived in a place with a name well known to many—Selma, AL. As you see, I am truly a product of the State.

I am here today representing Zeta Phi Beta Sorority, Inc., to speak in strong support of the nomination of Judge Clarence Thomas.

Zeta Phi Beta Sorority was founded in 1920 on the campus of Howard University in Washington, DC. The sorority now encompasses over 75,000 black American women with more than 500 graduate and college chapters across the country. Our members come from various walks of life. We are educators, students, entertainers, corporate executives, entrepreneurs, lawyers, and judges.

Zeta Phi Beta Sorority is committed to making a positive impact on the future of our children, and we do this by serving as mentors, assisting in providing educational opportunities, and helping to decrease the effects of the social ills which plague our communities.

Zeta Phi Beta sponsors numerous scholarships through our national foundation. Through our Stork's Nest Program, we provide prenatal care for indigent mothers. As another example of our involvement, we recently initiated a drug and substance abuse program for collegiate students.

In addition, Zeta Phi Beta has joined with many African-American organizations to address "the black male crisis" and have made this issue our national project for 1991. Through these and other programs we are demonstrating our commitment to improve our community.

Zeta Phi Beta Sorority, Inc. is a member of the Leadership Conference on Civil Rights. We are, however, on record with the conference as nonconcurring with their position as it relates to the confirmation of Judge Clarence Thomas. We believe that Judge Thomas is qualified to serve on the U.S. Supreme Court. As pointed out by the American Bar Association, Judge Thomas has the judicial temperament, the integrity, honesty, intelligence, and independence necessary to serve on our Nation's highest court. We agree and urge his confirmation.

We are particularly concerned about the opposition to Judge Thomas. In many instances, there appears to be a double standard being applied to Judge Thomas. In addition, some who oppose him have said they are concerned because they think now that he has made it, he has forgotten from whence he came and who helped him get there.

We believe that in action and words, Judge Thomas has demonstrated over and over again that he has not forgotten. Anyone who makes a statement such as the one made by Judge Thomas when he said that he "was raised to survive under the totalitarianism of segregation, not only without the active assistance of government but with its active opposition." Judge Thomas added that he was "raised to survive in spite of the dark, oppressive cloud of governmentally sanctioned bigotry."

Mr. Chairman, he has not forgotten. Judge Thomas is living proof of the awesome accomplishments of the civil rights movement. Judge Thomas has acknowledged the fact that he is a direct beneficiary of the civil rights movement.

Judge Thomas wrote in *Integrated Education* that "many of us have walked through doors opened by the civil rights leaders; now you must see that others do the same. As individuals who have received the benefit of an education which was probably denied your fathers and mothers, and in some cases, sisters and brothers, you must devise a plan for a civil rights movement for the future."

In a speech at Savannah State College, Judge Thomas said, "We cannot forget the blood of the marchers, the prayers and hope of our race."

Mr. Chairman, these are not the words of a person who has forgotten.

Critics seem to believe that just because Judge Thomas has chosen a different road than they, that he must have forgotten

where he began. In a speech to Holy Cross College on March 24, 1984, Judge Thomas did not forget when he said,

Through my radical days, through my days at New Haven Legal Assistance, through the summer working under a grant from the Law Students Civil Rights Research Council, I did not forget. Through Holy Cross and Yale, I did not forget. As assistant attorney general and assistant secretary, I did not forget. As chairman of EEOC, I cannot and will not forget. I can never forget the agony of discrimination—the humiliation of prejudice.

In that speech, he went on to say,

I am an American—a black American. Nothing hurts me so much as the sufferings of my race. I firmly believe that the sufferings and the problems we face are so great that all who recognize them must look for solutions. We need new ideas in our arsenal of weapons to fight discrimination. At no time must we allow ourselves to believe that we must agree on every issue. We are not robots. We are a creative, resilient race. Just as we are different, we have different ideas and different opinions.

In these complex and troubled times, no one person or organization can claim to have the only answer to solve our problems. If they did, why are we still in this predicament?

As I mentioned earlier, Zeta Phi Beta Sorority has made the “black male crisis” our national project in 1991. We can think of no better message to send to our black youth than Judge Clarence Thomas. He should be the role model for those youth who have lost all hope and have lost the ability to dream dreams.

Yes, hard work, integrity, honesty, and intellectual independence are valued in this society. Let Judge Thomas’ appointment to the U.S. Supreme Court show how much.

The women of Zeta Phi Beta most definitely are in favor of the nomination of Judge Thomas. We know without question that he is exceptionally qualified to serve on the highest court of this Nation. We know he will not forget our shared life experience as African-Americans in this society. Nor do we fear that he will fail to hear the pleas and cries for fairness by all persons.

Thank you.

[The prepared statement of Ms. Thomas follows:]

Remarks by Yvonne Thomas in behalf of Zeta Phi Beta Sorority, Inc. before the Judiciary Committee Upon the Nomination of Judge Clarence Thomas To Be An Associate Justice of the Supreme Court of the United States.

*Good morning, Distinguished Members of the Senate Judiciary Committee,*

*I am Yvonne Thomas, a lifelong resident of the great State of Alabama. I was born and raised in Mobile, Alabama. I received my undergraduate education at Alabama State in Montgomery and received my masters degree from the University of Alabama in Birmingham. For the past 27 years, I have lived in a place with a name well known to many - Selma, Alabama. As you see, I am truly a product of the state.*

*I am here today representing Zeta Phi Beta Sorority, Incorporated, to speak in strong support of the nomination of Judge Clarence Thomas to become an associate justice of the Supreme Court of the United States.*

*Zeta Phi Beta Sorority was founded in 1920 on the campus of Howard University in Washington, D.C. The sorority now encompasses over 75,000 Black (African American) women in more than 500 graduate and collegiate chapters across the country. Our members come from various walks of life; we are educators, students, entertainers, corporate executives, entrepreneurs, lawyers and judges.*

*Zeta Phi Beta Sorority is committed to making a positive impact on the future of our children, and we do this by serving as mentors, assisting in providing educational opportunities, and helping to decrease the effects of the social ills which plague our communities.*

*Zeta Phi Beta sponsors numerous scholarships through our National Education Foundation. Through our Stork's Nest Program, we provide prenatal care for indigent mothers. As another example of our involvement, we recently initiated a Drug and Substance Abuse Program for collegiate students.*

*In addition, Zeta Phi Beta has joined with many other African American organizations to address "The Black Male Crisis" and have made this issue our National Project for 1991. Through these and other programs, we are demonstrating our commitment to improve our community.*

*Zeta Phi Beta Sorority, Inc., is a member of the Leadership Conference on Civil Rights. We are, however, on record with the Conference as non-concurring with their position as it relates to the confirmation of Judge Clarence Thomas. We believe that Judge Thomas is qualified to serve on the U.S. Supreme Court. As pointed out by the American Bar Association, Judge Thomas has the judicial temperament, the integrity, honesty, intelligence, and independence necessary to serve on our nation's highest court. We agree and urge his confirmation.*

*We are particularly concerned about the opposition to Judge Thomas. In many instances, there appears to be a double standard being applied to Judge Thomas: in addition, some who oppose him have said they are concerned because they think now that he has made it, he has forgotten from whence he came, and who helped him get there. We believe that in action and word, Judge Thomas has demonstrated over and over again that he has not forgotten. Anyone who makes a statement such as the one made by Judge Thomas when he said that "[he] was raised to survive under the totalitarianism of segregation, not only without the active assistance of government but with its active opposition." Judge Thomas added that he was "raised to survive in spite of the dark oppressive cloud of governmentally sanctioned bigotry." Mr. Chairman, He has not forgotten*

*Judge Thomas is living proof of the awesome accomplishments of the civil rights movement. Judge Thomas has acknowledged the fact that he is a direct beneficiary of the civil rights movement. Judge Thomas wrote in Integrated Education that "many of us have walked through doors opened by the civil rights leaders, now you must see that others do the same. As individuals who have received the benefit of an education which was probably denied your fathers and mothers, and in some cases sisters and brothers, you must devise a plan for a civil rights movement for the [future]." And in a speech at Savannah State College, Judge Thomas said: " We [cannot] forget the blood of the marchers, the prayers and hope of our race." Mr. Chairman, these are not the words of a person who has forgotten.*

*Judge Thomas has demonstrated his compassion and deep commitment to the youth of this country. No, he has not called a press conference or issued news releases every time that he has helped a fellow human being. Instead, he has worked quietly and continuously to help those less fortunate, such as his 12 year old pen pal from Georgia. Through his personal interaction, Judge Thomas has inspired both a young black male and his mother to work hard to help the son reach his goal of becoming a doctor. By his example, he has given this young man hope: if Clarence Thomas can rise from the poorest of conditions in Pin Point, Georgia, to graduate from Yale Law School and be nominated for the Supreme Court, this young man can become what he*

*dreams to be.*

*Critics seem to believe that just because Judge Thomas has chosen a different road than they, that he must have forgotten where he began. In a speech to Holy Cross College on March 24, 1984, Judge Thomas did not forget when he said, "Through my radical days, through my days at New Haven Legal Assistance, through the summer working under a grant from the Law Student's Civil Rights Research Council, I did not forget. Through Holy Cross and Yale, I did not forget. As Assistant Attorney General and Assistant Secretary, I did not forget. As Chairman of the EEOC, I cannot and will not forget. I can never forget the agony of discrimination – the humiliation of prejudice." In that speech he went on to say, "I am an American – a black American. Nothing hurts me so much as the sufferings of my race. I firmly believe that the sufferings and the problems we face are so great that all who recognize them must look for solutions. We need new ideas in our arsenal of weapons to fight discrimination. At no time must we allow ourselves to believe that we must agree on every issue. We are not robots – we are a creative, resilient race. Just as we are different we have different ideas and different opinions."*

*Mr. Chairman, he has not forgotten how his grandfather was called boy or that his grandmother could not use certain rest rooms. Let me bring something to the attention*

*of his critics who say that the judge has stated that the government has no role to play in eliminating discrimination. In a speech at an EEOC seminar on December 6, 1983, in Pittsburgh, Judge Thomas declared that "The Federal government has always had both a profound moral obligation and a constitutional duty to protect individual rights. Increasingly that ideal has gained the force of the law. But, in the words of Frederick Douglas, 'Power concedes nothing without a demand.' And, even the government did not move decisively until the thunderous demand of protest against injustice could, no longer, be ignored."*

*In these complex and troubled times, no one person or organization can claim to have the only answer to solve our problems. If they did, why are we still in this predicament?*

*As I mentioned earlier, Zeta Phi Beta Sorority has made the Black Male Crisis our national project in 1991. We can think of no better message to send to our Black youth than Judge Clarence Thomas. He should be the role model for those youth who have lost all hope and have lost the ability to dream dreams. Yes, hard work, integrity, honesty, and intellectual independence are valued in this society. Let Judge Clarence Thomas' appointment to the U.S. Supreme Court show how much.*

***The women of Zeta Phi Beta, most definitely are in favor of the nomination of Judge Thomas. We know without question that he is exceptionally qualified to serve on the highest court of this nation. We know he will not forget our shared life experience as African Americans in this society. Nor do we fear that he will fail to hear the pleas and cries for fairness by all persons.***

***Thank you.***

Senator HEFLIN. Dr. Becton.

**STATEMENT OF JULIUS BECTON, JR.**

Mr. BECTON. I am delighted to return briefly to this chamber. My name is Julius Becton, and I am president of Prairie View A&M University, part of the Texas A&M University System. And I might add that I have a plane to catch in about 35 minutes.

I am here to support the President's nomination of Clarence Thomas to the Supreme Court.

Prior to arriving at Prairie View in 1989, I directed the Federal Emergency Management Agency, and before that, director of the Office of Foreign Disaster Assistance in the Agency for International Development. Prior to that, I served in the Army almost 40 years.

It was during my tenure at FEMA that I first met Judge Clarence Thomas, when he was the head of the EEOC. We were among the very few black political appointees holding key Government positions at that time.

The value, I hope, of my testimony today lies in my personal belief in Judge Thomas as a man and as a compassionate civil servant. I recommend him as a Supreme Court Justice for several reasons.

I know him to be a good man, a man who sincerely wishes to employ his authority as a civil servant for the betterment of society. This includes his desire to promote the advancement of minorities without infringing on the rights of the majority.

This point is particularly critical in order to avoid reverse discrimination, with the resulting backlash that goes with it. Too prolonged, too concentrated an effort to make up for past injustices can create new injustices.

As a footnote, in my judgment, such making up for the past can also stifle individual initiative because we look to someone else, usually government, to solve problems that are within our own power to solve.

Equal treatment, not preferential treatment, is what Judge Thomas is all about.

I would like to mention a few initiatives and actions of Judge Thomas that recommend him as an effective judge and administrator.

As head of the EEOC, Judge Thomas enforced the laws against employment discrimination. The office went to court 60 percent more often than was done in previous years.

His record on the Federal appeals court shows judicial restraint rather than activism.

There are two specific efforts in which Judge Thomas participated that illustrate a concern for the advancement of minorities—the Minority Leaders Fellowship Program and the General Motors agreement.

In 1989, Judge Thomas encouraged the Washington Center to establish a Minority Leaders Fellowship Program whose concept is to identify outstanding minority students who could benefit from an internship in Washington, DC.

As chairman of the EEOC in 1983, Clarence Thomas signed a \$42.5 million 5-year agreement with General Motors Corp., which was the largest nonlitigated settlement in EEOC history.

Thirty-nine HBCU's, or historically black colleges and universities, received endowments as a result of his actions to enhance the educational opportunities for students in the engineering and technological fields. Prairie View A&M University was one of those institutions aided through Judge Thomas' efforts. We received \$250,000.

It is clear, at least to me, from these and other examples, that Clarence Thomas has been concerned for quite some time about correcting minority injustices by taking positive actions to resolve them. I believe we all can agree that men and women of good will can agree on the goal of helping minorities yet differ on the means of achieving that goal. Their differences may be the result of opposing political philosophies, or based on a preference for alternative strategies.

I can empathize with the committee and your responsibility in this hearing. You must offer your best advice and consent—not your rubber stamp—in the matter of Clarence Thomas' nomination to the Supreme Court. Therefore, I would urge that partisan politics be put aside in deciding on this lifetime appointment, just as a justice must put aside mere personal predilections.

Which leaves us with the evidence of the man himself: Clarence Thomas' background, his service to his country, his recorded opinions and actions. We all want good men and women on the Supreme Court in the sense that they have the intellectual competence to make crucial judgments on behalf of the Nation, and in the sense that they have the moral values and conscience to guide them through those difficult issues. It is appropriate that we demand a high calibre individual for this position, for the justices must distill a lifetime of education and experience and thought into their judgments, yet they must look beyond themselves as individuals to the Nation's higher agenda.

In this sense, Clarence Thomas would unquestionably serve this country well on the Supreme Court.

Thank you, sir.

[The prepared statement of Mr. Becton follows:]

**Testimony**  
**On Behalf of The Nomination of Clarence Thomas**  
**To the U.S. Supreme Court**  
 by Julius W. Becton, Jr., President  
 Prairie View A&M University  
 The Senate Judiciary Committee  
 Washington, D.C.  
 Thursday, September 19, 1991

My name is Julius Becton, and I am president of Prairie View A&M University in Texas--which is my alma mater, I am proud to say. I am speaking to you today to recommend Clarence Thomas to the U.S. Supreme Court.

Prior to arriving at Prairie View in 1989, I directed the Federal Emergency Management Agency and the U.S. <sup>Office of</sup> Foreign Disaster Assistance Agency for International Development. Prior to that, I served in the U.S. Army for <sup>almost</sup> 40 years.

It was during my time at FEMA that I knew Judge Clarence Thomas, when he was head of the Equal Employment Opportunity Commission. We were among the very few blacks holding key government positions at that time, and we naturally became acquainted.

The value of my testimony today lies in my personal familiarity with Judge Thomas as a man and as a compassionate civil servant.

I recommend Judge Thomas as a Supreme Court Justice for several reasons:

- I know him to be a good man--a man who sincerely wishes to employ his authority as a civil servant for the betterment of society. This includes his desire to promote the advancement of minorities, without infringing on the rights of the majority.

--more--

## 2.

- This point is particularly critical in order to avoid reverse discrimination, with the resulting backlash that goes with it. Too prolonged, too concentrated an effort to "make up" for past injustices can create new injustices.
- As a footnote, in my judgement, such "making up for the past" can also stifle individual initiative, because we look to somebody else, usually government, to solve issues that are within our own power to solve.
- Equal treatment, not preferential treatment--is what Judge Thomas is about.

• I would like to mention several initiatives and actions of Judge Thomas that recommend him as an effective judge and administrator:

1. As head of the EEOC, Judge Thomas enforced the laws against employment discrimination. The Office went to court 60% more often than it had in previous years.
2. His record on the federal appeals court shows judicial restraint, rather than activism. This merely means that his judgements were based on close readings of the law.
3. His views of Brown vs. the Board of Education indicate that he is not in disagreement with the court's decision but that he finds the "natural law" approach of "inalienable rights" a stronger legal basis for a colorblind society than sociological data.

3.

4. There are two efforts Judge Thomas participated in that illustrate a concern for the advancement of minorities:

a. The Minority Leaders Fellowship Program:

Judge Thomas encouraged the Washington Center to establish a Minority Leaders Fellowship Program in 1989.

- The concept of this program is to identify outstanding minority students who can benefit from an internship in Washington, D.C.
- Home institutions give the students academic credit, waive tuition and grant a \$1,000 living stipend. The Washington Center provides scholarship funding for tuition and housing fees.
- Judge Thomas helped create the program's advisory board, which he served on, and he worked to design the program, identify speakers, and arrange a start-up endowment of \$285,000.
- The first \$200,000 was set aside as an endowment, with \$85,000 providing assistance to students in the 1989 program.
- Mr. Bill Burke, President of the Washington Center, has said, " Mr. Thomas supported our program and encouraged us to do what we could to provide access to these minority students."

--more--

4.

**b. The General Motors Agreement:**

As Chairman of the EEOC in 1983, Clarence Thomas signed a \$42.5 million, five-year agreement with General Motors Corporation.

- The largest non-litigated settlement in EEOC history, the agreement resolved hundreds of employment discrimination claims against GM.
- In addition, General Motors agreed to provide over \$10 million in endowments and scholarships for educational opportunities for minorities and women--particularly in engineering and technological fields where minorities have been underrepresented.
- Many historically black universities received endowments, and another \$1 million in grants was provided to trade and technical schools.
- Prairie View A&M University was one of these institutions aided through Clarence Thomas' efforts.
- A grant of \$250,000 was given to the university, and the same amount was provided for a total of 39 universities, plus \$50,000 going to Columbia University and \$500,000 to the University of Tulsa's Minority Business Development Center.

It is clear from these and other examples that Clarence Thomas has been concerned about correcting minority injustices by taking positive actions to resolve them

## 5.

We can all agree that men and women of good will can agree on the goal of helping minorities yet differ on the means of achieving that goal.

- Their differences may be the result of opposing political philosophies, or based on a preference for alternative strategies.

I sympathize with the committee's responsibility in this hearing.

- You must offer your best advice and consent--not your rubber stamp, in the matter of Clarence Thomas' nomination to the Supreme Court.
- Therefore, I would urge that partisan politics be put aside in deciding on this lifetime appointment, just as a justice must put aside merely personal predilections.

Which leaves us with the evidence of the man himself: Clarence Thomas' background, his service to his country, his recorded opinions and actions. (Let me note that a man against the advancement of minorities would not have played the crucial role that Clarence Thomas played in the Washington Center program or the General Motors settlement.)

We all want good men and women on the Supreme Court,

- in the sense that they have the intellectual competence to make crucial judgements on behalf of the nation,
- and in the sense that they have the moral values and conscience to guide them through difficult issues.

6.

It is appropriate that we demand a high calibre individual for this position. For the justices must distill a lifetime of education and experience and thought into their judgements--yet they must look beyond themselves as individuals to the nation's higher agenda.

In this sense, Clarence Thomas would unquestionably serve our country well on the Supreme Court.

END

Senator HEFLIN. Thank you, Dr. Becton.

I understand that Senator Biden wants some questions, but I will go ahead right now.

Senator THURMOND, do you have some questions?

Senator THURMOND. I haven't asked any.

Senator HEFLIN. I think we would excuse you, Dr. Becton, if you—of course, the choice is yours—if you want to make that plane.

Mr. BECTON. I certainly would like to make that plane because I have a board to face tomorrow morning in Texas.

Senator HEFLIN. Well, we will be glad to excuse you, and we thank you for your testimony.

Mr. BECTON. Thank you.

Senator HEFLIN. Senator Thurmond?

Senator THURMOND. Thank you very much.

I want to welcome this panel here. I think you all made excellent statements, and I appreciate your taking the time to come here and testify on behalf of Clarence Thomas for the Supreme Court.

Now, without going into a lot of detail, I want to ask you the same two questions I have asked many times through these hearings. Do you feel that Clarence Thomas has the integrity, the professional competence, and the judicial temperament to make a good member of the U.S. Supreme Court?

If you will answer that, Dr. Jenkins. I then would ask Ms. Thomas.

Mr. JENKINS. I do, Senator.

Ms. THOMAS. I do, Senator.

Senator THURMOND. The other question is do you know of any reason why Clarence Thomas should not be confirmed by this Committee and the Senate for the Supreme Court?

Mr. JENKINS. I do not, Senator.

Ms. THOMAS. I do not, Senator.

Senator THURMOND. Are you convinced from all that you know about Clarence Thomas that he is well qualified to be an excellent member of the Supreme Court of the United States?

Mr. JENKINS. Yes, we do, Senator.

Ms. THOMAS. Yes, Senator.

Senator THURMOND. That is all the questions I have. I want to thank you very much for your appearance here. I think you made good witnesses.

The CHAIRMAN. I thank you very much, and I personally apologize for not being here. I was on the—right inside that door there is a little phone booth, and I was on the telephone doing what I am sure a lot of parents are doing, responding to a call from my son in college. He called, he wanted to know if he should send me money. That was the reason for the call. [Laughter.]

But I sincerely apologize.

And I know, Chancellor, you fully understand about college students.

Mr. JENKINS. Yes, sir, I fully understand.

The CHAIRMAN. But I do appreciate your testimony. Thank you both. Ms. Thomas, thank you very much for coming and taking the time. Appreciate it.

Our next panel—

Senator HEFLIN. Senator Specter may have some questions.

The CHAIRMAN. Oh, I beg you pardon. I was told by the staff that they were ready to break. I am really sorry.

Senator SPECTER. Thank you, Mr. Chairman. I would like to ask one very brief question of each witness.

The CHAIRMAN. Please.

Senator SPECTER. Dr. Jenkins, you were here and heard the testimony of the last panel, I believe.

Mr. JENKINS. Yes, I was.

Senator SPECTER. Because I know you have been patiently waiting. There were some very strong testimony given by Mr. Julius Chambers on behalf of the NAACP Legal Defense Fund, and his essential position was that George Thomas was not qualified by comparison to all of the 48 nominees who have been seated in the Supreme Court, and he took strong exception to Judge Thomas' views on education cases and voting rights cases, saying that Judge Thomas had dismissed major decisions which had protected African-Americans without regard to the historical background.

If you have any comment or something to say on behalf of Judge Thomas on those issues, I would be—I think the panel would be interested to hear them.

Mr. JENKINS. Senator, I would simply say to you that I am here this evening because I find in the technical sense no reason to question Judge Thomas' capabilities, and, in fact, worthiness to sit on the Supreme Court, one.

Two, I think there is a great deal of misinformation, and perhaps even confusion, in terms of his interpretation or his view on various issues that have been discussed here today. But I do know clearly that in 1983 at Clark College in Atlanta, GA, he gave a very moving speech about his concern for the survival of historically black colleges and universities, and he talked about the need to not only protect those institutions, but he talked about the need to enhance them so that they could continue to do the valuable job of turning out black professionals in our society.

And I am here this evening, sir, as a college president to actually support that concept, because I believe that what we do is the very best example of self-help. We are—we were there and we were born because at some time in history we were not allowed to attend the historically white institutions. And, in that best spirit, we organized and established the historically black colleges and universities.

So, in a real sense I believe that our continued existence is the shining example of self-help and helping America to solve its problems.

Senator SPECTER. Ms. Thomas, the comments made by Mr. William Lucy, president of the Coalition of Black Trade Unionists, went to the issue of affirmative action. And Mr. Lucy was critical of Judge Thomas on the ground that Judge Thomas was not helping the group of African-Americans by refusing group help but only interested in individual, specific cases of discrimination.

And I would be interested if you agree with Judge Thomas who generally opposes affirmative action, and how you would assess that position of Judge Thomas' in terms of the interest of the African-American community.

Ms. THOMAS. Senator, I am here in behalf of my sorority, and my sorority has endorsed Judge Thomas very highly on his, maybe, past contributions he has made to the Court and courts and what have you.

At this time I wouldn't want to say anything that my sorority wouldn't approve of me saying. But we are on record as being supportive of Judge Thomas and his works, and his contributions he has made to the courts.

Senator SPECTER. Thank you very much. Thank you both.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. And, Chancellor, congratulations on your 100th year.

Mr. JENKINS. Thank you, sir.

The CHAIRMAN. I wish your institution 100 more. I imagine you will be seeing a fair amount of former Congressperson Bill Gray.

Mr. JENKINS. Yes.

The CHAIRMAN. I know he will be knocking on our doors to make sure we are involved in—our doors, meaning us individually. He has not been disinclined to ask for contributions for black colleges.

Mr. JENKINS. Well, let it be noted, sir, that while we certainly are in support of what Congressman Gray would be doing with the United Negro College Fund, I represent a public black university and we do not benefit from the funds of the United Negro College Fund.

The CHAIRMAN. Oh, you don't? Is that right?

Mr. JENKINS. I think that that should be made very clear because I do believe that in a national sense people believe that such a contribution contributes to all of the historically black colleges and universities. That is not true, and that is not to create any confusion or to not continue to wish the United Negro College Fund well. It is simply to correct the record and let people know that we do not benefit.

The CHAIRMAN. Well, I am glad you told me that. I thought you were a private institution.

Mr. JENKINS. No, we are a public institution.

The CHAIRMAN. I see Senator Simon has come, and I hope he has no questions. [Laughter.]

Senator SIMON. Just one.

Ms. THOMAS. Mr. Chairman, excuse me. If I may interrupt you?

The CHAIRMAN. Surely.

Ms. THOMAS. I have a plane to catch.

The CHAIRMAN. Please go. Go.

Senator SIMON. You go right ahead.

The CHAIRMAN. We don't pay attention to Simon anyway. We don't.

I am only kidding, obviously. I hope we haven't kept you too long. And when you walk outside and you hear drums beating, what you are hearing is, I was asked permission by the distinguished Senator from Alaska whether or not a festivity that was being put on by the State of Alaska in the rotunda here in this building would be able to go forward, notwithstanding the fact this hearing was underway. It has been planned for sometime. I don't think it is in any way interfering with any of the witnesses or us. So, if you open the door, though, and you walk outside, it is not

because you have suffered a long day. It is, in fact, there is an interesting ceremony going on outside, and a number of Native Americans and Eskimos are putting on folk dances outside the door.

Mr. JENKINS. I understand.

The CHAIRMAN. Senator.

Senator SIMON. Yes. Dr. Jenkins, your school does not benefit directly from the Historically Black Colleges Act, I gather.

Mr. JENKINS. Well, we were talking about the United Negro College Fund.

Senator SIMON. I understand.

Mr. JENKINS. Right.

Senator SIMON. But I am talking about the title under the Higher Education Act.

Mr. JENKINS. Oh, definite. Yes, sir, we do.

Senator SIMON. You do?

Mr. JENKINS. Yes.

Senator SIMON. Now, what would your attitude be toward the nominee if you believed he would rule that unconstitutional?

Mr. JENKINS. Well, Senator, let me say that I have prefaced my statement, and indeed the motivation for my being here this evening was due to the fact that the cases that I cited, as an example the one with the General Motors settlement, as another case in point, the one in which he spoke about the worthwhileness of these institutions and why they should continue to be enhanced with funds, led me to believe that he would not take such a position.

Senator SIMON. I don't think there is any question that he believes these institutions do a good job.

Mr. JENKINS. And that they should also be enhanced with additional funds going to them for upgrading libraries and other facilities on the campuses.

Senator SIMON. OK. But the question is additional funds. And, if I may read from one of the things he has written.

"I firmly insist that the Constitution be interpreted in a color-blind fashion," and then he criticizes in this same writing "race conscious legal devices."

Now, it is pretty hard for me to read that and not come to the conclusion that he would have serious problems with something that is very vital to a great many institutions in this Nation that are performing a huge service to the African-American community as well as to the Nation.

I just mention that because it is pretty difficult to read this and not come to the conclusion that if there were a matter before the Court he would rule it unconstitutional.

Mr. JENKINS. I understand your statement, Senator. I would simply say to you that because of the business that I am in certainly I would not be amenable or acceptable in terms of looking at a person who may take a position different from the position that I take in terms of the fact that these institutions are treasures and deserve to be preserved, but not only that, to be enhanced, and I simply go by the statements that he has made in the past about these institutions. I look also at this own background, and I draw the assumption that given the opportunity to redress past discrimi-

nation as relates to these institutions that he would opt for the side of guaranteeing that these institutions would continue to survive.

Senator SIMON. Thank you very much. I hope you are right, and I thank you.

The CHAIRMAN. Thank you very much, Senator.

Thank you very much, Chancellor.

Mr. JENKINS. Thank you.

The CHAIRMAN. Again, congratulations on your 100th.

Mr. JENKINS. Thank you.

The CHAIRMAN. Do you play Delaware State?

Mr. JENKINS. No, I do not, Senator.

The CHAIRMAN. They are tough.

Now, our next panel, we have combined two panels of witnesses who are testifying in opposition to Judge Thomas' nomination, and these witnesses are:

Sharon McPahil, on behalf of the National Bar Association. Ms. McPahil is president of the Detroit, MI, Chapter of the National Bar Association. Welcome, Ms. McPahil.

Adjoa Aiyetoro, National Director, National Conference of Black Lawyers, welcome.

Ms. AIYETORO. Thank you.

The CHAIRMAN. Did I pronounce it correctly?

Ms. AIYETORO. Yes, you did. Thank you.

The CHAIRMAN. Mr. William Hou, Chair of the Legislative Committee for the National Asian Pacific American Bar Association. Welcome, Mr. Hou.

Mr. HOU. It is pronounced Hou.

The CHAIRMAN. Hou. You may call me Bidden, if you would like. [Laughter.]

Ms. Leslie Seymore, vice chairperson of the National Black Police Association. Welcome. Daniel Schulder, director of legislation for the National Council of Senior Citizens; Naida Axford, president of the National Employment Lawyers Association; Reverend Bernard Taylor, chairman of the Black Expo Chicago, which works with minority entrepreneurs. We have added Reverend Taylor to this panel to accommodate his travel schedule, but apparently we were not fully able to accommodate his travel schedule, because he is not here, so what we will do is enter his statement in the record.

Senator SIMON. Yes, I was going to say he was here earlier.

The CHAIRMAN. I know he was, and I wasn't being facetious when I said that. I am sorry we were unable to get him on in time.

Why don't we begin in the order you have been called on, unless you have worked out as a panel a different way to proceed.

Ms. McPahil, if you will begin first, please.

**STATEMENT OF A PANEL CONSISTING OF SHARON McPAHIL, NATIONAL BAR ASSOCIATION; ADJOA AIYETORO, NATIONAL CONFERENCE OF BLACK LAWYERS; WILLIAM HOU, NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION; LESLIE SEYMORE, NATIONAL BLACK POLICE ASSOCIATION; DANIEL SCHULDER, NATIONAL COUNCIL OF SENIOR CITIZENS; NAIDA AXFORD, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; AND REV. BERNARD TAYLOR, BLACK EXPO CHICAGO**

Ms. McPAHIL. Thank you.

Chairman Biden, Senator Thurmond, members of the Senate Judiciary Committee, I was going to say good afternoon, but good evening. My name is Sharon McPahil. I am president of the National Bar Association—a small correction, not the Detroit Chapter, of the National Bar Association. We have approximately 73 chapters.

The CHAIRMAN. You are president of the entire—

Ms. McPAHIL. I am the national president, yes.

The CHAIRMAN. I have had the pleasure to speak to the National Bar. It is quite an organization, and I apologize. I didn't realize—we are going to fire three staff persons for that. All kidding aside, I apologize.

Ms. McPAHIL. No problem. Thank you.

I am also a division chief in the Wayne County Prosecutors Office, in Detroit, MI.

I am pleased to have this opportunity to come before you in my first appearance before this committee as president of the NBA. I have only been president for approximately 3 weeks. I appear before you today on behalf of the National Bar to give voice to the views and opinions of our members with regard to the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

The National Bar Association is the oldest and largest minority bar association. We were founded in 1925, and we consist of a network of approximately 14,000 African-American lawyers, jurists, scholars and students. We have affiliate chapters throughout the United States and in the Virgin Islands.

Our purpose, among other things, is to advance the science of jurisprudence, to uphold the honor of the legal profession, to promote social intercourse among the members of the bar, and to protect the civil and political rights of all citizens of the United States.

My term as president commenced August 10, 1991. On August 5, after 7 hours of deliberation, the National Bar Association voted by a very narrow margin to oppose the confirmation of Judge Thomas. Our delegates voted 45 percent in opposition to the nomination, 44 percent in support of the nomination, and 11 percent to remain neutral on his possible confirmation.

As you can imagine, it was very difficult for us to make a decision about Judge Thomas. Never before in my memory has an issue so troubled the association. As a group, we are always pleased when one of our members is recognized for his achievements, and we are especially pleased when one is given this unique opportunity to serve in one of the most powerful positions in this Nation.

We are also cognizant of our responsibility to objectively assess and present our views on the conformation of a Supreme Court

nominee, who will have the ability to opine on matters that will touch the lives of all Americans.

Our analysis required us to be mindful of the impact that Judge Thomas' philosophy might have on his ability to protect the interests of all Americans, particularly the disenfranchised, the poor, and those who might otherwise not have a voice on the Supreme Court. The decision was made even more difficult, because Clarence Thomas is a member of our association.

As we searched for consensus on this issue, there was unanimity in our view that this confirmation hearing is also about the countless African-American people and other minorities who live in substandard conditions, it is about the homeless, the crack babies and the pregnant women who may not have a right to hear of their options regarding their reproductive rights.

Finally, it is about those minorities in the United States who look around every day and have to know that they don't matter to some of the Justices who sit on the Supreme Court, who have never had to face the obstacles that someone like Clarence Thomas encounters on a daily basis.

It is clear to the members of the National Bar Association that equal opportunity is not the reality of this land, despite the plethora of court decisions and statutes to the contrary. From unskilled jobs to the vice presidencies in major corporate America, we are both under and unrepresented.

Many delegates at our convention noted that the daily indignities that we suffer, as African-American attorneys, are pervasive, and, thus, you can be assured that the problems of African-Americans with less formal education and less affluence are even greater.

Much like the problem that an African-American person in a suit has in hailing a taxi, America's well-suited minorities every day confront the subjective bias of white America. Given that sensitivity, many of our delegates believed that when a person of color is nominated, that fact alone is reason to support him.

As our delegates debated this issue, it became clear that many thought that the views articulated by Judge Thomas were contrary to the traditional dogma of civil rights organizations. Some believe that the National Bar, as a matter of integrity, in light of its history of being at the forefront of the civil rights struggle, was duty-bound to oppose him. It is in this context that the National Bar Association was so closely divided in its vote to oppose the confirmation of Judge Thomas.

The subliminal message of most of those who spoke during the debate is not as conflicted. We pray that he will hear his grandparents' whispers, if confirmed, and his mother's voice as he struggles to balance the twin debts of gratitude to those who afforded him the opportunity to be considered for this honor, this appointment to the Supreme Court, and to those who brought him here.

Thank you.

The CHAIRMAN. Thank you very much, Ms. McPahil.

Your organization is, in fact, one of the premier organizations of the country, and it must have been very difficult.

Ms. MCPAHIL. It was.

The CHAIRMAN. But we thank you for being here.

Pronounce the name again for me?

Ms. AIYETORO. Ms. Aiyetoro.  
The CHAIRMAN. Ms. Aiyetoro, please.

#### STATEMENT OF ADJOA AIYETORO

Ms. AIYETORO. Thank you, Chairman Biden.

Chairman Biden and members of the Judiciary Committee, thank you for allowing the National Conference of Black Lawyers, through me as the director, to present this testimony before the committee.

The National Conference of Black Lawyers is an organization of lawyers, judges, legal workers, and law students that was formed in 1968, specifically for the purpose of advocating for the rights of black people specifically, and people of color, the poor and the disadvantaged generally.

The organization has participated on all levels of advocacy, including litigation and public education. You have our written testimony.

The CHAIRMAN. And it will be placed in the record, the entire testimony.

Ms. AIYETORO. Thank you very much.

Our testimony discusses our position more fully than I will be able to do in the 5 minutes allotted. I would like to briefly address two main issues, however, in opposition to Judge Thomas' nomination.

First, it is important that the significance of the nominee's race to this process be explicitly in the record. We are disturbed that the assessment of this candidate may be less strenuous by those who view themselves as antiracist, because he is a black person who, like many other black people in his age group or who came before him, have risen to occupational levels that far exceed those of their parents and even their siblings.

We are disturbed that those who have adopted in deed, if not in words, the philosophy of white supremacy are embracing him, because his blackness serves to mislead many in assessing his record, a record which demonstrates, in large part, a disdain for the very remedies he utilized to advance, when applied to persons of color other than himself.

Those who are confused, well-meaning of all races, hold onto the hope not supported in his record, but somehow, if confirmed to the Supreme Court, he will support the law it is now for people of color, women and those in the fringes of society. They hope for a miracle.

We urge you to determine whether and how you are using this candidate's race and to decide to refuse to confirm, based on a record that demonstrates support for lawlessness and behavior that is below the standard to be demanded of a Supreme Court Justice.

It is true that the National Conference of Black Lawyers find a number of Judge Thomas' views to be in direct contradiction with the positions of this organization. We know you know this, because we have outlined some of those differences in our written submission. But his views also reflect a character that is below the standards this body should demand, a man who, despite the law of the land, refused to act to protect the rights of groups for whom he had

responsibility; a man who ignored codified ethical requirements and withheld information about the relationship between himself and the family of the principal shareholders in a lawsuit potentially costing them more than \$10 million; a man who sat on the advisory board of the Lincoln Review and attended a reception of the South African Ambassador, yet indicates to this committee that he did not know of any position in support of apartheid by the leadership of the review, and he himself did not support apartheid; a man who retracted position after position that he took prior to his nomination and urged you to look at only his and other nominees' comments as a judge, since they would be less effusive; a man who humiliated his sister and family, but now flaunts the sister, indicating her character is stronger than his.

This nomination is an insult to not only black people, not only the tradition of high integrity and character set by Thurgood Marshall, but to the ideals of the Constitution and the Constitutional Convention, that those who sit on the Highest Court will be those with whom we can look with pride and respect, although we may not always agree with them.

We cannot look with pride and respect at Clarence Thomas, but only with fear and trepidation, at how will continue to trample the rights of people of color, the disadvantaged and women, not in conformity to the law, but in disdain for it and their collective rights. We urge you to refuse to confirm.

Thank you.

[The prepared statement of Ms. Aiyetoro follows:]

**TESTIMONY CONCERNING THE NOMINATION OF  
JUDGE CLARENCE THOMAS,  
UNITED STATES COURT OF APPEALS,  
DISTRICT OF COLUMBIA,  
TO THE SUPREME COURT OF THE UNITED STATES  
BEFORE THE  
SENATE COMMITTEE ON THE JUDICIARY**

**Presented by:  
Adjoa A. Aiyetoro  
National Director  
National Conference of Black Lawyers**

Chairperson Biden and Members of the Judiciary Committee, the National Conference of Black Lawyers appreciates the opportunity to testify before you on the nomination of Clarence Thomas as Associate Justice of the Supreme Court. We urge you to refuse to confirm Judge Thomas' nomination.

The National Conference of Black Lawyers (NCBL), founded in 1968, is a national organization composed of Black judges, law professors, lawyers, law students and legal workers. The organization was formed to advocate for economic, social and political justice for people of color generally, and Black people specifically. It provides legal assistance to communities of color and develops educational forums to increase awareness of the numerous issues that affect communities of color. It seeks to rid the American legal system of racism and introduce law students to alternative legal careers which advance social change.

The NCBL believes that it is extremely important to confirm a person of African descent to serve on this country's highest court.<sup>1</sup> However, of greater importance to NCBL and its members is the confirmation of a candidate whose record demonstrates a clear respect for the law combined with a compassion to securing political, economic and social justice for the millions of people

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<sup>1</sup> In nominating Judge Thomas, President Bush attempted to deceive the American public by stating that, "[t]he fact that he is black and a minority had nothing to do with this." Indeed, Judge Thomas has been nominated to fill the seat left vacant by the retirement of Justice Thurgood Marshall, the 96th Supreme Court Justice and the only person of African descent to serve on the Supreme Court in its 202-year history. This nomination also comes on the heels of President Bush's veto of a Civil Rights Bill, while at the same time he says he supports civil rights. The fact that Judge Thomas is of African descent, thus, can hardly be a coincidence.

in this country excluded from the "American dream." Judge Thomas' record demonstrates none of these aspirations. Clarence Thomas scoffs at the legal values essential to maintaining the hard-won rights to social, economic and political justice for people of color, women, the disabled, the elderly, children and other historically disadvantaged groups. There are any number of lawyers and judges of African descent who have demonstrated respect for these values. Judge Thomas' record<sup>2</sup> indicates that he is not one of those persons and for this reason he should not be confirmed. Indeed, his record consistently reveals disrespect for the law and for the rights of individuals and groups guaranteed by law. For this reason, NCBL is testifying today in opposition to Judge Thomas' confirmation as an Associate Justice of the Supreme Court of the United States.

Mr. Chairman, President Bush's nomination of Judge Thomas to fill the seat vacated by Justice Marshall is an insult not only to people of color and women but to the legacy of Justice Marshall. His lackluster career supports our conclusion that the nomination of Judge Thomas is meant to confuse and manipulate those who firmly believe there should be a person of African descent on this Court while solidifying a conservative majority. For over 50 years Justice Marshall has been a champion of the constitutional, civil

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<sup>2</sup> Our opposition to Judge Thomas' confirmation as an Associate Justice of the Supreme Court rests on Judge Thomas' record as Assistant Secretary for Civil Rights at the Department of Education, his eight-year tenure as Chair of the Equal Employment Opportunities Commission (EEOC), his decisions as an appellate judge of the Court of Appeals for the District of Columbia and Judge Thomas' writings and speeches.

and human rights of people of color, women, the elderly and differently-abled people in this country. Although Justice Marshall's nomination to the Supreme Court was opposed in 1967 by some members of this body because of his race, he was, unlike Judge Thomas, eminently qualified for service on the Supreme Court.<sup>3</sup> But for the efforts of Justice Marshall, the NAACP and the NAACP LDF, many, if not most of the Black lawyers in this country, including Clarence Thomas, would not have graduated from law school - not because we were unqualified, but because of the barriers, many of which were governmentally imposed, that barred our admission.<sup>4</sup>

As Professor Derrick Bell of Harvard University stated in discussing Judge Thomas' qualifications to serve on the Supreme Court, "[e]ven had Bush limited his selection pool to Black judges on the federal courts of appeals, there are at least a half dozen other Black judges whose accomplishments, both on the bench and

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<sup>3</sup> Prior to his appointment to the Supreme Court, Justice Marshall was a private attorney in Baltimore, Maryland; chief counsel to the National Association for the Advancement of Colored People (NAACP); head of the NAACP Legal Defense Fund; an Appellate Justice of the United States Court of Appeals for the Second Circuit; and, Solicitor General of the United States.

During his over 22-year tenure with the NAACP and NAACP Legal Defense Fund, Justice Marshall argued 34 cases before the Supreme Court and won 29. Among Justice Marshall's string of victories, in addition to Brown v. Board of Education, was Sweat v. Painter, decided four years prior to Brown, holding the educational opportunities offered Black and Caucasian law students by the State of Texas violated the 14th Amendment and directing Texas to admit Herman Sweat into the University of Texas.

<sup>4</sup> See generally, Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1975).

before becoming federal judges, put those of Thomas to shame."<sup>5</sup>

Mr. Thomas, prior to his appointment to the Court of Appeals in 1990, had very little litigation experience, functioning more in administrative and legislative capacities. Indeed, he owes virtually all of his employment experiences to his relationship to Senator John Danforth. Upon graduation from law school in 1974, Mr. Thomas served as an Assistant Attorney General for the State of Missouri for less than three years. From January 1977 to August 1979, Mr. Thomas was an attorney in the Law Department of the Monsanto Company in Missouri. Thereafter, from August 1979 to May 1981, Mr. Thomas was a Legislative Assistant to Senator Danforth of Missouri.

In 1981, Mr. Thomas was appointed by then-President Reagan to become Assistant Secretary for Civil Rights in the Department of Education, a position he initially declined because, in his own words "my career was not in civil rights and I had no intention of moving into this area." In 1982, Mr. Thomas was appointed Chair of the EEOC, a position he held until his confirmation to the Court of Appeals in 1990. But even if one ignores his lack of litigation experience, his administrative record and his speeches and writings underscore his departure from the rule of law.

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<sup>5</sup> D. Bell, "The Choice of Thomas Insults Blacks," New York Newsday, July 10, 1991, pp. 79-90.

JUDGE THOMAS' RECORD AT THE DEPARTMENT OF EDUCATION

The Office of Civil Rights of the Department of Education (OCR) is responsible for insuring that educational institutions do not discriminate on the basis of race, sex, handicap and age. The OCR is responsible for enforcing Title VII of the Civil Rights Act and Title IX of the Educational Amendments of 1973.

As Assistant Secretary of Civil Rights at the Department of Education, Mr. Thomas, notwithstanding his professed admiration and support of Black colleges, adopted positions that made it far easier for the states to avoid their responsibility of ensuring equality among all state financed educational institutions. When Judge Thomas took office as Assistant Secretary, the Department had been under court order since the early 1970s to implement desegregation and to enhance Black colleges to make up for their historical neglect by many southern governments.<sup>6</sup> The court order made clear that institutions which receive federal funds must do more than just adopt non-discriminatory policies but also must take affirmative steps, including elimination of duplicate programs as well as enhancement of Black colleges.<sup>7</sup>

During Thomas' first months at the agency, he began to undermine enforcement of this court order by accepting state plans

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<sup>6</sup> See, Adams v. Bell, 711 F.2d 161, 187 (D.C. Cir. 1983), cert. denied, 465 U.S. 1021, 104 S.Ct. 1272, 79 L.Ed.2d 678 (1984); Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977); Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975); Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1974); aff'd. 480 F.2d 1159 (D.C. Cir. 1973).

<sup>7</sup> See Adams v. Bell, 711 F. 2d 161 (1983).

which gave the states free reign to control desegregation efforts. In accepting these higher education plans, the OCR waived established guidelines that had the force of law. The positions taken by the OCR under Thomas' leadership led to increased budget reductions, admission constraints and other barriers that had a negative effect on Black institutions of higher learning.

In effect, Mr. Thomas, while Assistant Secretary for Civil Rights, deliberately disobeyed a court order. He substituted his own personal views for the court order, even though, as he admitted in federal court, the beneficiaries under the civil rights laws would have been helped by compliance with the court order.

**JUDGE THOMAS' RECORD AS CHAIR OF THE  
EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION**

Mr. Chairman, Judge Thomas' record as chair of the Equal Employment Opportunities Commission alone warrants the rejection of his nomination. As you are aware, the EEOC is responsible for the enforcement of Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment based on race, color, religion, sex or national origin; the Equal Pay Act, the Age Discrimination in Employment Act, and Section 501 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap by federal agencies. The EEOC is also responsible for coordinating all equal employment programs in the federal work place.

During Mr. Thomas' eight-year tenure as Chair of the EEOC, "[t]he EEOC effectively lost the role as lead agency conferred to it by the historic Civil Rights Reorganization Act of 1978, not

because of any change in the law but by abdication to the Justice Department."<sup>8</sup> Specifically, during Mr. Thomas' administration, the backlog of cases rose from 31,500 in 1983 to 46,000 in 1989; while the number of class action suits filed by the EEOC actually decreased from 218 in fiscal year 1980 to 129 in 1989. The number of Equal Pay Act cases filed by the EEOC also declined under his leadership. In 1980, 50 Equal Pay Act cases were filed. After Thomas assumed leadership, there were nine cases in 1984; in FY 1985, ten; in FY 1986, twelve; in FY 1988, five, and in FY 1989, seven cases.

Although Judge Thomas attempted to justify the reduction in class action cases by claiming that the agency was placing greater emphasis on individual complainants, this was far from the truth. In fact, the EEOC under Thomas' leadership saw a sharp decline in the rate of remedies for individual claimants: settlement rates plunged from 32.1 percent in 1980 to 13.9 percent in fiscal year 1989. A 1988 review by the General Accounting Office of the investigations of charges that had been closed with "no cause" determinations by six EEOC district offices and five states found that 41 to 82 percent of the charges closed by the EEOC offices were not fully investigated, and 40 to 87 percent of those closed by the state agencies had not been fully investigated.<sup>9</sup> Moreover,

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<sup>8</sup> Eleanor Holmes Norton's comments appeared in 62 Tulane Law Review, 601, 703 (1988).

<sup>9</sup> U.S. General Accounting Office, Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges 3 (1988).

according to Professor Herbert Hill, who for more than a quarter of a century was the National Labor Director of the NAACP, during Judge Thomas' tenure at the EEOC, "over 90 percent of all litigation filed under Title VII" was initiated and conducted by the private bar.<sup>10</sup>

Further, in 1984 and again in 1985, without either a basis in the prevailing case law or consultation with the various federal agencies and interested parties, Judge Thomas unilaterally proposed significant changes in the Uniform Guidelines on Employee Selection Procedures. The Guidelines, adopted in 1978, were jointly drafted and issued by the Department of Justice, the Department of Labor, the Civil Service Commission (later renamed the Office of Personnel Management) and the EEOC, with the solicited input of civil rights groups. The purpose of the Guidelines is to provide employers and others with a statement of the prevailing law on all selection practices used to make employment decisions, including application forms, educational requirements and standardized tests.<sup>11</sup>

At the time, the Guidelines were based on Griggs v. Duke Power Co.,<sup>12</sup> a unanimous Supreme Court decision and the-then leading Supreme Court decision on employment tests. Under Griggs, employment tests or selection criteria that have a disparate impact

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<sup>10</sup> Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2nd Sess, at p. 59 (Letter from Professor Herbert Hill to Clarence Thomas, dated May 29, 1987).

<sup>11</sup> 29 C.F.R. 1607.1 (1991).

<sup>12</sup> 401 U.S. 424 (1971).

on people of color and women are prohibited unless the criteria are shown to be job-related. Although recent Supreme Court decisions have shifted the burden of proving job-relatedness from the employer to the plaintiff, the rule established by Griggs - that statistical evidence may be used to demonstrate disparate impact - remains intact.<sup>13</sup>

Judge Thomas, as the EEOC Chair, attacked the Guidelines because in his view they encouraged "too much reliance on statistical disparities evidence of employment discrimination."<sup>14</sup>

<sup>13</sup> See Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989).

<sup>14</sup> "Changes Needed in Federal Rules on Discrimination," New York Times, December 3, 1984, at A1. In a March, 1985 speech to Cascade Employers Association Thomas stated:

We have permitted sociological and demographic realities to be manipulated to the point of surreality convenient legal theories such as adverse impact...we have locked amorphous, complex, and sometimes unexplainable social phenomena into legal theories that sound good to the public, please lawyers, fit legal precedents, but make no sense. If I have my way, we will have the legal theories conform to reality as opposed to reality being made to conform to legal theories.

Speech to Cascade Employers Association, p. 18 (March 13, 1985).

In another speech in August, 1985, Thomas, attacking what he believed was the rationale of the Guidelines and Griggs, said:

The premise underlying [the Guidelines] is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins...[The Guidelines] also see[m] to assume inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race-and sex-neutral. Operating from these premises, [the Guidelines] ma[e] determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term 'discrimination.'

Reprinted in Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor 99th

In the same December 1984 interview with the New York Times, Mr. Thomas went so far as to criticize the merits of his own agency's then-pending lawsuit against Sears, although it was consistent with the theory of the Guidelines, stating that it "relies almost exclusively on statistics." Through these machinations, Thomas attempted to make proof of discrimination insurmountably difficult, with total disregard for current law.

Judge Thomas' unilateral attempt to revise the Uniform Guidelines was not the only instance in which his actions while at the EEOC demonstrated a lack of respect for the law and the rights of victims of discrimination. Since 1979, the EEOC had on its books regulations concerning affirmative action, adopted after notice and comment pursuant to the Administrative Procedure Act, providing it with the authority to grant immunity under Title VII. These regulations authorized employers to take affirmative action, including goals and timetables to improve employment opportunities for people of color and women. The "overview" of these regulations published at the time of their adoption states:

It is the Commission's interpretation that the appropriate voluntary affirmative action, or affirmative action pursuant to an administrative or judicial requirement, does not constitute unlawful discrimination in violation of the Act.<sup>15</sup>

Judge Thomas, who has variously attacked affirmative action programs as creating "a narcotic of dependency" and "social

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Cong., 1st Sess., 27-28 (1985).

<sup>15</sup> EEOC Guidelines on Affirmative Action, 44 Fed. Reg. 4422, Jan. 19, 1979, codified as 29 CAR 1608 (1989 edition).

engineering," disapproved of the Affirmative Action Guidelines and, thus, sought to evade them. In the fall of 1985, the EEOC Acting General Counsel, with Judge Thomas' support, ordered EEOC regional attorneys not to include goals and timetables in settlement proposals or other actions in which the EEOC had intervened. In addition, the Acting General Counsel ordered the EEOC legal staff not to seek enforcement of goals and timetables in existing consent decrees. Here again Judge Thomas' action demonstrated both disrespect for the law and indifference to the rights of victims of discrimination.

Although Judge Thomas attempted to justify his rejection of the use of goals and timetables on the basis of Firefighters v. Stotts,<sup>16</sup> his actions were legally and procedurally indefensible, as Professor Alfred Blumrosen pointed out in opposing Thomas' nomination to the Court of Appeals:

If Chairman Thomas' view was that the use of goals and timetables was illegal after Stotts the proper course of administrative action was to suspend those sections of the Affirmative Action Guidelines which authorized their use. The Administrative Procedure Act permits an agency to act promptly in issuing or revising a rule when it finds for "good cause" that "notice and public procedures are impracticable, unnecessary, or contrary to the public interest." This would have allowed public notice of the EEOC's position, would have been based on a formal legal opinion which could then have been considered by the concerned community. But Chairman Thomas had a preference for private decisionmaking, rather than public participation.<sup>17</sup>

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<sup>16</sup> 467 U.S. 561 (1981).

<sup>17</sup> Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2nd Sess, at p. 94 (Statement of Professor Alfred W. Blumrosen).

Finally, in one of the most controversial and outrageous incidents of his eight-year tenure at the EEOC, the EEOC allowed more than 13,000 Age Discrimination in Employment (ADEA) claims to lapse by failing to act within the prescribed time limits, thereby compromising the discrimination claims of thousands of older workers, who comprise more than one-third of the national work force. Ultimately, Congress had to pass special legislation to reinstate the rights of those older workers whose claims the EEOC had failed to act on.

As thirteen members of the House of Representatives with oversight responsibilities for the EEOC expressed to President Bush in a letter concerning Mr. Thomas' nomination to the Court of Appeals: "during Mr. Thomas' administration, the Commission . . . adopted policies involving pension accrual, supervised waivers, apprenticeship exclusions and early incentive plans inimical to ADEA's purpose - to encourage the employment of qualified older workers." In a series of cases involving precisely the kinds of early retirement plans the ADEA was designed to prohibit, the EEOC sided with the employer. In Lusardi v. Xerox Corp., for example, the EEOC declined to assist over 100 older workers who were faced with an early retirement program and could not join a class action suit because of a class cutoff date. The EEOC refused to assist the workers even though the EEOC staff had found substantial reason to believe that there was a company policy of targeting older, higher paid employees for termination. In Paolillo v. Dresser Industries.

Inc.,<sup>18</sup> the EEOC, after the plaintiffs prevailed on appeal, filed an amicus brief in support of the employer's request for a modification of the decision. Specifically, the Commission argued that the plaintiffs should have been forced to meet a higher standard for showing coercion and that the plaintiffs should have to carry the burden of proof on the question of voluntariness.

NCBL is particularly outraged by Judge Thomas' treatment of the discrimination complaints of elderly workers because, as members of this Committee well know, people of African descent are disproportionately represented among the ranks of the unemployed and underemployed and consequently often have to work longer than white workers.

**JUDGE THOMAS' RECORD AS AN APPELLATE JUDGE  
OF THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

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Last year, when President Bush nominated Mr. Thomas for the Court of Appeals, his nomination was opposed by various civil rights and civil liberties organizations and individuals because of his record at the EEOC and his otherwise slender legal experience. In the less than two years since his appointment to the Court of Appeals Judge Thomas has authored 20 opinions, most of them in the area of criminal law and procedure and, in all but one, he ruled against the defendant.

People of color and the poor are disproportionately represented as defendants in the criminal court. Judge Thomas' lack of sensitivity to them as a group, evidenced by his record in

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<sup>18</sup> 821 F. 2d 81 (2nd Cir. 1987).

the Court of Appeals, combined with his record at the EEOC and OCR, lead the NCBL to the opinion that his confirmation to the Supreme Court would serve only to continue to eviscerate the hard-won criminal procedural rights that once protected defendants from governmental misconduct.

Judge Thomas appears to be particularly insensitive to the prejudice that may result from the joinder of offenses or of defendants and the admission of prior convictions and acts. In one case, for example, Judge Thomas affirmed the conviction of a defendant who had requested and been denied a severance of his trial, even though the attorney of one of his co-defendant's had called him to testify, knowing he would refuse to do so, undermining his constitutional rights against self-incrimination.<sup>19</sup> In another case, United States v. Rogers,<sup>20</sup> Judge Thomas authored the opinion for the Court upholding a defendant's conviction over his arguments that the district court had improperly admitted evidence of his prior conviction and past ownership of a beeper. The elevation to Supreme Court of Judge Thomas will certainly add an additional vote to the increasingly conservative trend in the Court in the area of criminal procedure, which this past term overturned five of its own recent cases.

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<sup>19</sup> United States v. Harrison; United States v. Black; United States v. Butler, 932 F. 2d 65 (1991).

<sup>20</sup> 918 F. 2d 207 (D.C. Cir. 1990).

As a member of the Court of Appeals, Judge Thomas has also demonstrated undue deference to federal agencies that suggests, in particular, a disregard for the rights of workers and environmental protection issues. In one case Judge Thomas rejected a union challenge to a Labor Department decision permitting a mine owner in Alabama, in violation of federal health and safety regulations, to use a high-voltage electrical cable within 150 feet of a working mineface over arguments by the union that use of such cables increased miners' exposure to dust and methane, created ventilation problems and made escape from the mines more difficult.<sup>21</sup>

In another case, Citizens Against Burlington v. Busby,<sup>22</sup> a group of Ohio citizens who live near the Toledo airport and who use a park and campground near the airport challenged the Federal Aviation Administration's (FAA) decision to allow expansion of the airport. The Ohio citizens urged that expansion of alternative airports where less environmental damage might occur be considered by the FAA in its environmental impact statement. The law requires consideration of "reasonable alternatives" in environmental impact statements. Writing for the majority, Judge Thomas ruled against the citizens and accepted the FAA's reasoning that the only alternative needed to be considered was the goal of improving the Toledo economy. Judge Thomas' lack of sensitivity to the rights of criminal defendants and apparent deference to federal agencies,

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<sup>21</sup> International Union, United Mineworkers of America v. Federal Mine Safety and Health Administration, 931 F.2d 908 (D.C. Cir. 1991).

<sup>22</sup> (D.C. Cir. LEXIS 12035 1991)

however, are not the only reasons for our concern over his record at the Court of Appeals. We are also troubled by Judge Thomas' lack sensitivity to the obligation of all judges, federal and state, to maintain the integrity of the judicial process by steadfast vigilance to the highest standard of ethical conduct. In September 1990, in an apparent violation of the standards for judicial conduct, Judge Thomas participated in and authored the opinion for the Court in Alpo Petfoods Inc. v. Ralston Purina Company,<sup>23</sup> reducing a \$10.4 million damage claim against Ralston Purina Company, a corporation owned in large part by the family of Judge Thomas' personal friend and political mentor, Senator John Danforth. Judge Thomas neither disclosed his relationship to Senator Danforth or disqualified himself as required by federal law.<sup>24</sup>

#### JUDGE THOMAS' WRITINGS AND SPEECHES

We are also troubled by Judge Thomas' legal and judicial philosophies expressed in his writings and speeches. In his writings and speeches, Judge Thomas has demonstrated a disturbing disdain for the members of the legislative branch and criticized a number of important Supreme Court decisions. Judge Thomas has written: "As Lt. Col. Oliver North made it perfectly clear last

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<sup>23</sup> 913 F.2d 958 (D.C. Cir. 1990).

<sup>24</sup> See 28 U.S.C. 455a; 28 U.S.C. 455e.

summer, it is Congress that is out of control."<sup>25</sup> In a discussion of the increasing role of the courts, Judge Thomas stated: "Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside the court upheld in Fullilove v. Klutznick," the 1980 ruling establishing congressional power to enact minority set-aside programs.<sup>26</sup>

In addition to Fullilove, Judge Thomas has attacked the Court's decisions in United Steel Workers v. Weber,<sup>27</sup> Local 28 of the Sheet Metal Workers' International Association v. EEOC,<sup>28</sup> and Johnson v. Transportation Agency, Santa Clara County<sup>29</sup> as "egregious" examples of "creative interpretations of equal protection and legislative intent."<sup>30</sup> In the same article, Judge Thomas, in a frightening display of ignorance of the importance of the Fifth Amendment due process and equal protection guarantees to the millions of people who reside outside the fifty states, in the District of Columbia, Puerto Rico, the Virgin Islands, Guam and

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<sup>25</sup> C. Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law and Public Policy 63.

<sup>26</sup> 448 U.S. 448 (1980).

<sup>27</sup> 443 U.S. 193 (1979).

<sup>28</sup> 478 U.S. 421 (1986).

<sup>29</sup> 478 U.S. 421 (1986).

<sup>30</sup> Thomas, "Civil Rights as principle Verus Civil Rights as an Interest," in Assessing the Reagan Years 391, 396 (D. Boaz, ed. 1988).

elsewhere, stated "[a]ny equal protection component of the Fifth Amendment due process is irrelevant."<sup>31</sup>

Additionally, Judge Thomas has repeatedly expressed support for the long discredited doctrine of "natural law." According to Professor Lawrence Tribe, Thomas is the first Supreme Court nominee in 50 years to "maintain that natural law should be readily consulted in constitutional interpretation."<sup>32</sup> As one Supreme Court justice wrote in dissenting from the Court's natural rights analysis in a 1798 probate case: "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject. . . ."<sup>33</sup> The last time the Supreme Court applied the natural law doctrine some 80 years ago, the Court held that the Constitution protects such economic rights as the "liberty" of employers to conduct business free of health and safety regulations and minimum wage laws.<sup>34</sup>

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<sup>31</sup> See e.g. Bolling v. Sharpe, 347 U.S. 497 (1954) (holding segregation of public schools in the District of Columbia violative of the Due Process Clause of the Fifth Amendment).

<sup>32</sup> Lawrence H. Tribe, "Natural Law and the Nominee," New York Times, July 15, 1991.

<sup>33</sup> Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (Iredell, J. dissenting).

<sup>34</sup> See, e.g., Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (denying a woman a license to practice law because "...civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of men and woman...") Muller v. Oregon, 208 U.S. 412 (1908) (upholding a statute that limited the number of hours women could work because "healthy mothers are essential to vigorous offspring, [and] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race).

If Judge Thomas is appointed to the Supreme Court, his views with respect to natural law may have a drastic consequence. In a 1987 speech to the Heritage Foundation, for example, Judge Thomas praised as "a splendid example of applying natural law" an article that argued not only for the overruling of Roe v. Wade,<sup>35</sup> but for the recognition of an "inalienable right to life of the child-about-to-be-born (a person)." Judge Thomas has also criticized the majority and concurring opinions in Griswold v. State of Connecticut,<sup>36</sup> a decision that gave married couples the right to purchase birth control.

NCBL and its members are deeply concerned by the Supreme Court's possible reversal of Roe v. Wade because women of color and poor women were overwhelmingly overrepresented among the women who died, were left sterile or suffered other serious medical complications as a result of illegal abortions prior to the Court's decision in Roe. In 1972, prior to Roe, women of color represented 64% of the deaths associated with illegal abortion,<sup>37</sup> and they would be similarly endangered upon Roe's reversal.

Overturning Roe will also leave women even more vulnerable to the recent trend in criminal prosecution for prenatal conduct. This strategy punishes women rather than providing them with necessary health care. It has been wielded disproportionately

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<sup>35</sup> 410 U.S. 113 (1973)

<sup>36</sup> 381 U.S. 479 (1965).

<sup>37</sup> Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 9 Fam. Plan. Persp. 86, 87 (1976).

against women of color.<sup>38</sup> Despite equal rates of drug and alcohol use across race and class, women of color and low-income women have been found to be ten times more likely to be reported for prenatal conduct.<sup>39</sup> Low income women and women of color are disproportionately subject to such prosecution because their only access to health care is through public facilities where drug testing of pregnant women is also routine.

Finally, NCBL is deeply troubled by both Thomas's apparent support for the current South African government and his lending of the prestige of his office to efforts supporting the racist regime in South Africa. For the past ten years Mr. Thomas has served as a member of the Editorial Advisory Board of the Lincoln Review, the quarterly publication of the Lincoln Institute for Research and Education, founded by J. A. Parker, who is a paid agent of the racist government of South Africa and who has been described as Thomas' political mentor.<sup>40</sup> Mr. Parker and one of the two contributing editors of the Lincoln Review, William A. Keyes, among other things, are the founders of the International Public

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<sup>38</sup> See, e.g., Johnson v. Florida, No. 89-1765 (Fla. Dist. Ct. App. April 18, 1991); Michigan v. Hardy, No. 128458 (Mich. Ct. App. April 1, 1991); Commonwealth v. Pelligrini, No. 87970, slip op. (Mass. Sup. Ct. Oct. 15, 1990).

<sup>39</sup> Chasnoff, Landress & Barrett, "The Prevalence of Illicit Drug or Alcohol Use During Pregnancies & Discrepancies in Mandatory Reporting in Pinellas County, Florida" 322 New England Journal of Medicine 1202 (1990); Kolata, New York Times, July 20, 1990 at A13; and Winslow, Wall Street Journal, April 27, 1990.

<sup>40</sup> See e.g., Russ Bellant, "The Thomas connection has white South African angle," National Catholic Review, August 2, 1991; Herb Boyd, "Clarence Thomas and his right-wing bedfellows," Amsterdam News, August 31, 1991.

Affairs Consultants, Inc. (IPAC), a lobbying firm incorporated in Virginia in 1985 and registered with the Justice Department under the Foreign Agents Registration Act as an agent of Pretoria. According to the September 10, 1987 filings for IPAC, one of the IPAC's activities listed as "Political Propaganda" was a reception held for the South African Ambassador. Mr. Thomas is listed as attending as EEOC Commissioner.

Our serious concerns about this nominee are not assuaged by Judge Thomas' attempts, in the last few days, to downplay his extreme views, his loyalty to which he has manifested through years of action, writing and speeches. His sudden inconsistency and professed sensitivity neither negate the deeds of the past nor inspire confidence in his ability or sincerity in the future to uphold and apply the law and to act to ensure that the rights of the disadvantaged in this country are protected.

#### **CONCLUSION**

Mr. Chairman, after a careful review of Mr. Thomas' record, summarized herein, we ask that the Committee refuse to confirm Mr. Thomas.

The CHAIRMAN. Thank you very much, Ms. Aiyetoro, for a very straightforward and direct statement. We appreciate it.

Ms. AIYETORO. Thank you.

The CHAIRMAN. Mr. Hou.

#### STATEMENT OF WILLIAM HOU

Mr. HOU. Thank you, Mr. Chairman, members of the committee.

The National Asian Pacific-American Bar Association, NAPABA, with several thousand members, is the national organization of Asian Pacific-American Attorneys. NAPABA represents the professional concerns of its membership, and promotes the interests of the fastest growing minority group in this country, the Asian Pacific-American community.

NAPABA encourages the nomination of minority candidates to the Supreme Court and believes that, once confirmed, such Justices, with a perspective that may otherwise be absent, can play a vital role in the deliberations of the court.

However, while Judge Thomas' background is appealing, it is not, in and of itself, a sufficient basis to support his nomination. Indeed, NAPABA, after careful review and deliberation of Judge Thomas' record, opposes his nomination to the Supreme Court for the reasons set forth in the written statement which we have submitted to the committee.

The CHAIRMAN. Which will be placed in the record, as well. All of your statements will be placed in the record in full—all of your written statements, if that is what you desire.

Mr. HOU. Yes, it is. Thank you, Mr. Chairman.

My testimony today will focus on two aspects of Judge Thomas' views that are especially disturbing from an Asian Pacific-American perspective.

The first is the potentially troubling ramifications of Judge Thomas' flirtation with natural law principles as a basis for judicial decisions. In particular, Judge Thomas readily cites Justice Harlan's dissent in *Plessy v. Ferguson* as "one of our best examples of natural rights or higher law jurisprudence."

In his dissent, which is often credited for the concept of a color-blind constitution, Justice Harlan, nonetheless, referred, with tacit approval, to racist Chinese Exclusion Acts, writing—

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.

Moreover, 2 years later, in *United States v. Wong Kim Ark*, Justice Harlan opposed the majority's decision to permit a man of Chinese descent who was born in this country to re-enter the United States upon his return from a visit to China. The dissent, joined by Justice Harlan, described the Chinese as, "of a distinct race and religion, apparently incapable of assimilating with our own people, who might endanger good order, and be injurious to the public interests."

Fortunately, Justice Harlan's position excluding Chinese from this great country did not prevail.

Not only am I, as an American of Chinese ancestry, honored to testify at these proceedings but, on a more personal note, I am

grateful, as my parents, both of whom were born in China, did not meet until after coming to America.

NAPABA does not mean to suggest that Judge Thomas condones Justice Harlan's views regarding the Chinese. Indeed, Judge Thomas has, himself, characterized Justice Harlan's comments as inappropriate. Nonetheless, such remarks vividly illustrate that the singling out of an ethnic group for unequal and unjust treatment is not necessarily inconsistent with the natural law analysis praised by Judge Thomas, raising serious questions about his nomination.

NAPABA's second concern is Judge Thomas' portrayal of Asian Pacific-Americans as a minority group whose accomplishments justify opposition to affirmative action. Specifically, Judge Thomas has asserted that because Asian Pacific-Americans have "substantially greater family incomes than whites," they have "transcended the ravages caused even by harsh legal and social discrimination."

He has also stated that Asian Pacific-Americans should not be the beneficiaries of affirmative action, because they are "overrepresented." NAPABA categorically rejects Judge Thomas' assertions which are inaccurate and misleading generalizations of the Asian Pacific-American experience.

For instance, among the Filipino, Asian, Indian, and Vietnamese communities, average family incomes are only a fraction of the average for caucasian families. Moreover, a crucial contributing factor to the incomes enjoyed by Chinese-, Japanese-, and Korean-American families, is simply the fact that more family members work than in other households.

Further, Asian Pacific-Americans are not overrepresented. In a recent study which reaffirmed the existence of the glass ceiling phenomenon, whereby qualified minority candidates are not promoted to senior management positions, the U.S. Commission on Civil Rights concluded that United States born Asian Pacific-American men are "less likely to be in managerial positions than whites with comparable skills and characteristics."

In embracing stereotypes and cliches, that is the "model-minority" myth, Judge Thomas displays insensitivity to the very real difficulties confronting Asian Pacific-Americans. Moreover, it is believed that Asian Pacific-Americans are not appropriate candidates for remedies such as affirmative action raises significant concerns, should Judge Thomas be called upon to adjudicate a discrimination claim brought by members of our community.

For the foregoing reasons, the National Asian Pacific-American Bar Association opposes Judge Thomas' nomination to the Supreme Court of the United States.

Thank you.

[The prepared statement of Mr. Hou follows:]

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**STATEMENT OF THE NATIONAL ASIAN PACIFIC AMERICAN  
 BAR ASSOCIATION REGARDING THE NOMINATION OF  
 THE HONORABLE CLARENCE THOMAS  
 TO THE SUPREME COURT OF THE UNITED STATES**

Contact: William C. Hou, Esq.  
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**INTRODUCTION**

The National Asian Pacific American Bar Association ("NAPABA"), after careful review and long, painstaking discussion, analysis and deliberation, opposes the nomination of the Honorable Clarence Thomas to the Supreme Court of the United States.

NAPABA is the national organization of Asian Pacific American attorneys, with thousands of members throughout the country. NAPABA represents the professional concerns of its members and promotes the interests of the fastest-growing minority group in the country -- the Asian Pacific American community. NAPABA has achieved recognition as an important source of leadership and resource, and acts as a national voice and effective advocate, for Asian Pacific American attorneys and their communities.

NAPABA's activities include: addressing the legal needs of Asian Pacific Americans; advocating equal opportunity in education and in the workplace; combating anti-Asian violence and other hate crimes; participating in the legislative process; monitoring judicial appointments; promoting Asian Pacific American political leadership; participating in the preparation of amicus briefs; presenting programs of particular interest to Asian Pacific American attorneys; and working in coalition with people of all colors in the legal profession and in communities at large.

NAPABA supports the nomination of minority candidates to the Supreme Court and believes that, once confirmed, such Justices, who possess a perspective that may otherwise be absent, can play a vital role in the deliberations of the Court. Judge Thomas undoubtedly has experienced poverty and felt keenly the sting of discrimination. It is also clear that Judge Thomas' diligence and hard work enabled him to succeed when given the opportunity as a result of affirmative action programs.

NAPABA Statement  
Page 2

The compelling nature of his life story, however, is not in and of itself a sufficient basis to support his nomination.

Evaluating Judge Thomas' suitability for lifelong tenure on the Supreme Court poses certain difficulties. Because Judge Thomas was only recently appointed to the U.S. Court of Appeals, his judicial record, the traditional primary source for evaluating a Supreme Court nominee, does not provide adequate information to evaluate his nomination. However, Judge Thomas has in other contexts spoken and written on topics such as affirmative action, employment discrimination, race, and judicial philosophy.

Based upon Judge Thomas' record, NAPABA has concluded that he should not be confirmed. First, the examples of "natural law" which Judge Thomas has advocated as appropriate for construing the Constitution have disturbing implications. Second, his inaccurate characterization of the Asian Pacific American community in his attempts to justify opposition to affirmative action are a cause of concern. Finally, his views on employment discrimination are contrary to previously well-settled law.

In addition to the aforementioned areas of particular interest from an Asian Pacific American perspective, there are a number of other factors, such as Judge Thomas' record while he served at the Office of Civil Rights of the Department of Education and as Chairman of the Equal Employment Opportunity Commission, which were also considered by NAPABA. Our concerns about that record have been aptly presented at these proceedings by other witnesses opposing Judge Thomas' nomination and therefore will not be repeated herein.

## ANALYSIS

### **A. Judge Thomas' advocacy of "natural law" has troubling ramifications.**

Judge Thomas has, in numerous articles and speeches, advocated the application of "natural law" concepts in construing the Constitution. His flirtation with natural law principles as a basis for judicial decisions has troubling ramifications, as can be readily seen from examining several Supreme Court cases mentioning or involving Asian Pacific Americans.

For instance, Judge Thomas has repeatedly praised as "one of our best examples of natural rights or higher law jurisprudence" Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), a Supreme Court case which espoused the "separate but equal" doctrine and upheld a Louisiana law requiring railroad companies to segregate their passenger cars based on race. Although Justice Harlan rejected the "separate but equal" doctrine in his dissent which is often cited for the concept of a "color-blind" Constitution, he nonetheless referred, with tacit approval, to the racist

Chinese Exclusion Acts: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." 163 U.S. at 561.

Moreover, two years after Plessy, the Supreme Court held in United States v. Wong Kim Ark, 169 U.S. 649 (1898), that pursuant to the plain language of the Fourteenth Amendment, any person born in the United States, under its jurisdiction, is a citizen. Thus, a man of Chinese descent who was born in this country was allowed to re-enter the United States following a visit to China. Significantly, Justice Harlan joined the dissent in arguing for his exclusion. In its analysis, the dissent quoted favorably from another case, Fong Yue Ting v. United States, 149 U.S. 698 (1893), describing the Chinese as "of a distinct race and religion . . . apparently incapable of assimilating with our people . . . [who] . . . might endanger good order, and be injurious to the public interests. . . ." 169 U.S. at 731. The Wong Kim Ark dissent then proclaimed: "It is not to be admitted that the children of persons so situated become citizens by the accident of birth." Id. at 731-732.

While NAPABA does not mean to suggest that Judge Thomas condones Justice Harlan's views regarding the Chinese, it is clear that Judge Thomas is fully aware of Justice Harlan's remarks in the Plessy dissent. Indeed, Judge Thomas, in an article defending Justice Harlan's analysis, has himself admitted that Justice Harlan's views on the Chinese are "opprobrious." Thomas, *Toward a "Plain Reading" of the Constitution -- the Declaration of Independence in Constitutional Interpretation*, 30 Howard L.J. No. 4 at 993 (1987). Nonetheless, Harlan's dissent in the Plessy and Wong Kim Ark cases vividly illustrate that the singling out of an ethnic group for unequal and unjust treatment is not necessarily inconsistent with the natural law analysis praised by Judge Thomas. That such overt racism is so readily evident -- in a context selected by Judge Thomas himself -- reflects poorly on the desirability of the theory and raises serious questions about the suitability of a Supreme Court candidate who has often commented favorably on the application of such natural law principles to judicial decisions.

**B. Judge Thomas inaccurately portrays the Asian Pacific American experience in his attempt to justify opposition to affirmative action.**

Judge Thomas has portrayed Asian Pacific Americans as a minority group whose accomplishments justify opposition to affirmative action as a remedy for discrimination. "Thomas Lowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," 8 Lincoln Review 7 (1988). Specifically, Judge Thomas asserts that because Asian Pacific Americans have "substantially greater family incomes than whites", they have "transcended the ravages caused even by harsh legal and social discrimination". Id. at 15. He goes on to state that Asian Pacific Americans are "overrepresented" in areas

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such as employment opportunities and hence, are not deserving beneficiaries of affirmative action as a remedy for discrimination. *Id.* at 16. NAPABA categorically rejects Judge Thomas' conclusions.

Judge Thomas' assertions are inaccurate and misleading generalizations of the Asian Pacific American experience. For example, with respect to family income, Judge Thomas fails to recognize the struggles of various ethnic groups which comprise the Asian Pacific American community. Had Judge Thomas investigated further, he would have found that among the Filipino American, Asian Indian American and Vietnamese American communities, average family incomes are only a fraction of the incomes of comparable Caucasian families. U.S. Commission on Civil Rights, The Economic Status of Americans of Asian Descent, 1988 at 8. Moreover, a crucial contributing factor to the incomes enjoyed by Chinese American, Japanese American and Korean American families is simply the fact that more family members work than in the average household. *Id.* at 9. Other Asian Pacific American households are larger than average so that when family incomes are adjusted on a per capita basis, the relative economic status of such Asian Pacific American families falls substantially. *Id.* Unfortunately, Judge Thomas is evidently content to accept the stereotypes and myths that continue to plague the Asian Pacific American community.

Further, NAPABA disagrees with Judge Thomas' belief that Asian Pacific Americans are overrepresented. In a 1988 study which reaffirmed the existence of the "glass-ceiling" phenomenon whereby qualified minority candidates are not promoted to senior management positions, the U.S. Commission on Civil Rights noted that U.S.-born Asian Pacific American men are "less likely to be in managerial positions than are whites with comparable skills and characteristics". *Id.* at 13. In embracing stereotypes and cliches (that is, the "model-minority" myth), Judge Thomas fails to recognize the very real difficulties and barriers confronting Asian Pacific Americans. Moreover, his belief that Asian Pacific Americans are not appropriate candidates for remedies such as affirmative action raises significant concerns should Judge Thomas be called upon to adjudicate a discrimination claim brought by Asian Pacific Americans.

**C. Judge Thomas' views on employment discrimination are in opposition to well-settled law.**

Judge Thomas has made numerous statements and has taken actions while at the Office of Civil Rights of the Department of Education and as Chairman of the Equal Employment Opportunity Commission that bring into serious question both his commitment to effective remedies to discrimination as well as his adherence to well established legal principles. In particular, Judge Thomas has repeatedly stated that statistical evidence is much overused in employment discrimination cases. Yet, statistical evidence is often extremely important in both proving and remedying employment discrimination.

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One type of claim which relies extensively on statistics is known as an "adverse impact" case. Restricting the use of statistics as a method of proof would essentially eliminate the ability to prove such cases, to the significant detriment of Asian Pacific Americans. For example, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), involved alleged discrimination against Filipino American cannery workers that was manifested by the segregation of those workers into inferior jobs and living conditions. As a result of the severe limitations placed on the use of statistics to demonstrate the segregation, it was not possible for those Filipino American workers to obtain relief.

Second, even in "disparate treatment" cases, statistics often are used to buttress a discrimination claim. For example, if an Asian Pacific American believes that he or she was not promoted to a managerial position because of discrimination (i.e., the "glass ceiling"), an important element of proving the existence of discrimination would likely include evidence that the employer has consistently passed over other qualified Asian Pacific Americans (i.e., statistical evidence).

In addition to making it significantly harder for those who have been discriminated against to prove their cases, Judge Thomas' views on goals and timetables would severely limit a victim's remedies. Because Judge Thomas, in his writings and speeches, has indicated his opposition to the use of goals and timetables against even proven and persistent discriminators, his views are contrary to recent Supreme Court decisions which have endorsed the use of goals and timetables when the defendant has discriminated against the protected group in the past. See, e.g., United States v. Paradise, 480 U.S. 149 (1987); Firefighters v. Cleveland, 478 U.S. 501 (1986); Local 28 Sheet Metal Workers Internat'l v. EEOC, 478 U.S. 421 (1986). Criticizing these well-settled decisions, Judge Thomas, in his capacity as EEOC Chairman, opposed "race conscious" relief distributing opportunities on the basis of race or gender.

## **CONCLUSION**

NAPABA's opposition is the result of a careful review of Judge Thomas' record as a public official, his writing and his speeches.

Judge Thomas' documented advocacy of the application of "natural law" principles to judicial decisions has disturbing ramifications and raises serious doubts about his suitability to serve as a member of the highest court in this country.

NAPABA is also concerned by Judge Thomas' attempts to use the Asian Pacific American community as a basis to justify opposition to affirmative action. Not only are such attempts inaccurate and contrary to established facts, but Judge Thomas' apparent readiness to embrace racial stereotypes and cliches is disturbing and raises significant concerns should Judge Thomas be called upon to adjudicate a discrimination claim brought by Asian Pacific Americans.

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Finally, the evidence is clear that Judge Thomas' opposition to using statistical evidence to prove discrimination, and his narrow view of appropriate remedies once discrimination is established, would impair severely an employment discrimination victim's ability to prove a discrimination case and to be made whole.

For the foregoing reasons, the National Asian Pacific American Bar Association opposes the nomination of the Honorable Clarence Thomas to the Supreme Court of the United States and urges that he not be confirmed by the United States Senate.

The CHAIRMAN. Thank you, and thank you for being under the time.

Ms. Seymore.

#### STATEMENT OF LESLIE SEYMORE

Ms. SEYMORE. Thank you, Mr. Chairman and members of the committee.

The testimony being presented today is in opposition to the nomination of Clarence Thomas to the position of Associate Justice of the U.S. Supreme Court.

In this time in the history of our country's judicial process, all citizens must be very concerned about the nomination of Judge Thomas. The following testimony is presented on behalf of the National Black Police Association, an advocacy organization which represents over 140 chapters of African-American police officers, nationally.

In our recent annual conference, of which two-thirds of our member chapters were present, the issue of President Bush's nomination of Clarence Thomas as an Associate Justice was discussed. After a careful presentation of the facts and materials surrounding Judge Thomas' record and career as a public official, the National Black Police Association voted to oppose his nomination.

Our purpose here today is to reiterate and reaffirm our opposition to the nomination of Clarence Thomas to the U.S. Supreme Court for the following reasons.

Clarence Thomas is opposed to affirmative action and other remedies for racial discrimination. He has repeatedly stated that any race-conscious remedy is no good. However, the courts have repeatedly provided such relief to minorities and women in order to address racial disparities in areas such as employment, education and housing. Surely, as African-Americans in our Nation's police departments, the use of affirmative action and other remedies for racial discrimination has provided us with the opportunity to make our communities and neighborhoods safe from crime and violence.

Since our beginning in 1972, the number of African-American officers has grown from less than 20,000 to over 48,000 today. In spite of Clarence Thomas' leadership as Chairman of the EEOC, there has been a 100 percent increase in the number of African-American police officers in the past 20 years.

After Judge Thomas' appointment as head of the EEOC, and the implementation of changes in its procedures, we have fewer African-Americans and women employed in police departments today than 10 years ago. Without affirmative action and other remedies, America would be a very different place. Access to opportunity is a key constitutional right, which cannot be compromised.

Bruce Wright, in his book "Black Robes, White Justice," had the following to say about minority progress.

Many blacks in the criminal justice system and in unrelated professions are bitterly amused by the white cry of "preferential treatment," "quotas," "affirmative action," and "reverse discrimination." These terms wage intellectual and ideological warfare against minority progress. Groups have surfaced demanding "white power," as though the locus of power has ever been with the blacks. The American Revolution stands as a precedent for how much white victims of oppression accept before they rebel. It is thus that the oppressed, when liberated, become the oppressors.

During his brief period of service on the U.S. Court of Appeals of the District of Columbia, Judge Thomas has repeatedly ruled against the accused in the face of alleged police or prosecutorial excesses. A court with Clarence Thomas serving as an Associate Justice could permit more American citizens to be abused and incarcerated.

To illustrate this point, in March 1991, the U.S. Supreme Court voted five to four to allow confessions obtained in violation of a defendant's constitutional rights. Chief Justice William H. Rehnquist's opinion states there may be other evidence of guilt that the use of an involuntary confession could be considered harmless error. The issue of "harmless error" analysis has been urged by the Bush administration.

Following on the heels of that decision was another ruling concerning the detaining of suspects. The Court ruled that suspects arrested without a warrant generally may be jailed for as long as 48 hours before a judge determines the validity of the arrest. By a five to four margin, the court ruled that "prompt" generally means 48 hours.

These two rulings have far-reaching implications. Some might argue these rulings are indeed needed to address the increasing crime rate, delays in the court system, and overcrowded jails. Nonetheless, can we afford to relinquish our basic constitutional rights in the process?

Based on the testimony we have heard from Judge Thomas during these hearings, there is little to indicate any resistance he may have toward continuing the increased power of police and other police agencies—an increase in power which ultimately may lead to a police state in our own country.

The precedent set by the Court's recent rulings is frightening. As African-American police officers, we totally reject the notion that his behavior is necessary to increase the quality of life and the absence of crime in our community.

Lastly, we disagree with those individuals who argue Clarence Thomas is an important role model for young African-Americans. In the past week we have been inundated with recollections of Judge Thomas' humble beginnings. I do not wish to refute nor negate the significance of his background or personal experiences, however, this committee should not allow itself to become entangled in the bitter-sweet musings of his hardships, for the hardships of Clarence Thomas are no greater nor harder than those of the average hardships of numerous African-American males his age or older.

President Bush's nomination of Clarence Thomas has created an illusion of a progressive, fair-minded administration. Yet, the irony is that this nomination is an attempt to satisfy a quota—a remedy which Clarence Thomas opposes. It is fair to say that the majority of African-Americans are proud to see one of their own achieve success. However, tokenism cannot be a factor in selecting the next Supreme Court Justice. The hard questions of Judge Thomas' philosophy and future direction as an Associate Justice has not been adequately addressed by this committee.

In conclusion, let me end with the following quote by Edwin Markham: "One of the tragedies of life is that once a deed is done, the consequences are beyond our control."

Thank you.

[The prepared statement of Ms. Seymore follows:]

STATEMENT OF

LESLIE J. SEYMORE

VICE CHAIRPERSON, NATIONAL BLACK POLICE ASSOCIATION

SEPTEMBER 18, 1991

SENATE JUDICIARY COMMITTEE

CONFIRMATION HEARING OF CLARENCE THOMAS

TO U.S. SUPREME COURT

Thank you Mr. Chairman and members of the Committee. The testimony being presented today is in opposition to the nomination of Clarence Thomas to the position of Associate Justice of the United States Supreme Court. At this time in the history of our country's judicial process, all citizens must be very concerned about the nomination of Judge Thomas.

The following testimony is presented on behalf of the National Black Police Association (NBPA), an advocacy organization which represents over 140 chapters of African American police officers nationally. At our recent Annual Conference, of which two-thirds (2/3) of our member chapters were present, the issue of President Bush's nomination of Clarence Thomas as an Associate Justice was discussed. After a careful presentation of the facts and materials surrounding Judge Thomas' record and career as a public official, the National Black Police Association voted to oppose his nomination.

Our purpose here today is to reiterate and reaffirm our opposition to the nomination of Clarence Thomas to the U.S. Supreme Court for the following reasons:

#### AFFIRMATIVE ACTION

Clarence Thomas is opposed to affirmative action and other remedies for racial discrimination. He has repeatedly stated that "any race-conscious remedy" is no good. However, the courts have

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repeatedly provided such relief to minorities and women in order to address racial disparities in areas such as employment, education and housing.

Surely, as African Americans in our nation's police department, the use of affirmative action and other remedies for racial discrimination has provided us with the opportunity to make our communities and neighborhoods safe from crime and violence. Since our beginning in 1972, the number of African American officers has grown from less than 20,000 to over 48,000 today. In spite of Clarence Thomas' leadership as Chairman of the EEOC, there has been a one-hundred (100%) percent increase in the number of African American police officers in the past twenty years.

After Judge Thomas' appointment as head of the EEOC and the implementation of changes in its procedures, we have fewer African Americans and women employed in police departments today than ten (10) years ago. Without affirmative action and other remedies, America would be a very different place. Access to opportunity is a key constitutional right which cannot be compromised.

Bruce Wright, in his book Black Robes, White Justice had the following to say about minority progress. "Many blacks in the criminal justice system and in unrelated professions are bitterly

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amused by the white cry of 'preferential treatment,' 'quotas,' 'affirmative action,' and 'reverse discrimination'. These terms wage intellectual and ideological war-fare against minority progress. Groups have surfaced demanding 'white power', as though the locus of power had ever been with the blacks. The American Revolution stands as precedent for how much white victims of oppression accept before they rebel. It is thus that the oppressed when liberated become the oppressors."

#### CONSTITUTIONAL RIGHTS AND INDIVIDUAL PROTECTION

During his brief period of service on the U.S. Court of Appeals of the District of Columbia, Judge Thomas has repeatedly ruled against the accused in the face of alleged police or prosecutorial excesses. A court with Clarence Thomas serving as an Associate Justice could permit more American citizens to be abused and incarcerated.

To illustrate this point, in March 1991, the U.S. Supreme Court voted 5 to 4 to allow confessions obtained in violation of a defendant's constitutional rights. Chief Justice William H. Rehnquist's opinion states there may be other evidence of guilt that the use of an involuntary confession could be considered "harmless error". The issue of "harmless error" analysis had been

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urged by the Bush Administration. Following on the heels of that decision was another ruling concerning the detaining of suspects.

The Court ruled that suspects arrested, without a warrant, generally may be jailed for as long as 48 hours, before a judge determines the validity of the arrest. By a 5 to 4 margin, the court ruled that "prompt" generally means within 48 hours.

These two rulings have far reaching implications. Some might argue these rulings are indeed needed to address the increasing crime rate, delays in the court system, and overcrowded jails. Nonetheless, can we afford to relinquish our basic constitutional rights in the process? Based on the testimony we have heard from Judge Thomas during these hearings, there is little to indicate any resistance he may have towards continuing the increased power of police and other police agencies. An increase in power which ultimately may lead to a "police state" in our own country.

The precedent set by the Court's recent rulings is frightening. As African American police officers, we totally reject the notion that this behavior is necessary to increase the quality of life and the absence of crime in our community.

Lastly, we disagree with those individuals who argue that

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Clarence Thomas is an important role model for young African Americans. In the past week, we have been inundated with recollections of Judge Thomas' "humble beginnings". I do not wish to refute nor negate the significance of his background nor personal experiences. However, this Committee should not allow itself to become entangled in the "bitter-sweet musings" of his hardships; for the hardships of Clarence Thomas are no greater nor harder than those of the average hardships of numerous African American males his age or older.

President Bush's nomination of Clarence Thomas has created an illusion of a progressive, fair-minded administration. Yet, the irony is that this nomination is an attempt to satisfy a "quota" -- a remedy which Clarence Thomas opposes. It is fair to say that the majority of African Americans are proud to see "one of their own" achieve success. However, tokenism cannot be a factor in selecting the next Supreme Court Justice. The hard questions of Judge Thomas' philosophy and future direction as an Associate Justice has not been adequately addressed by this Committee.

In conclusion, let me end with the following quote by Edwin Markham, "one of the tragedies of life is that once a deed is done, the consequences are beyond our control".

Senator SIMON [presiding]. Mr. Schulder.

**STATEMENT OF DANIEL SCHULDER**

Mr. SCHULDER. Thank you, Senator, and in behalf of the National Council of Senior Citizens, and our 5 million members, and 5,000 local clubs and State councils, I thank this committee for this opportunity to comment on the nomination of Judge Clarence Thomas to the Supreme Court.

As an advocacy organization, we support public and private activities and policies which advance the rights and needs of older persons, their families, and their communities. Over the past three decades we have placed ourselves at the side of workers, women, minorities, persons with disabilities, young people, and senior citizens, in their struggle for economic and social justice, and for full and effective civil rights.

Since its enactment in 1967, our organization has supported the Age Discrimination in Employment Act's expansion of rights and protections for working people, and its public policy objective to encourage older persons to continue to work and earn, and to contribute to the economies of their families and their communities.

We believe that Judge Thomas' record as Chairman of the Equal Employment Opportunity Commission marks him as a man whose official actions served to diminish the rights of older workers under the ADEA—the Age Discrimination in Employment Act. We believe that instead of creating a climate in which employers knew that discriminatory actions against older workers would be met with swift and sure sanctions and penalties, he sent signals that told employers that it was permissible to discriminate against older workers in pension, apprenticeship, early retirement and in exit incentive programs.

Under his administration as Chairman of EEOC for 8 years, thousands of older workers lost their rights to sue for relief against discriminatory practices, by allowing charges to lapse, or to be summarily closed without full, or any, investigation in many cases.

Over a period of years, his EEOC policies resulted in bipartisan congressional criticism, leading to numerous congressional interventions to protect the rights of workers, and to ensure that the clear language and intent of ADEA was enforced.

Mr. Chairman, we believe that allegations of Judge Thomas' misconduct in administering ADEA are well documented by committees and organs of this Congress, including the Senate and House Committees on Aging, the House Government Operations Committee, the Senate Committee on Labor and Human Resources, the General Accounting Office, and the frequent actions of the full Congress in changing and reversing policies and practices of the Thomas-led EEOC.

His record as Chairman provides the best material description of his philosophy of law, his responsiveness to the intent of the Congress, his concern for the rights of average persons facing economic hardships, and his adherence to consistent principles of justice and equity.

I should point out that his job—his position—as Chairman of EEOC was his longest public or private job.

Finally, Mr. Chairman, we trust that this committee can acknowledge that the corrosive influence of age discrimination ranks with racism, sexism and religious and ethnic bigotry in its effects on individuals and on the larger society and economy. Both racism and ageism assault the core human dignity of their victims.

That is why we have striven to fight the persistence of age stereotyping that remains a pervasive and virulent aspect of this Nation's labor market and that is why we find Judge Thomas' failures to administer the ADEA fairly so profoundly distressing.

During Judge Thomas' tenure as chair, the EEOC caused thousands of older workers to lose their rights and relief under ADEA by its failure to investigate in a timely fashion charges of job discrimination.

We are not aware of any similar level of nonfeasance involving title VII or the Equal Pay Act. Older workers, as a class, in our view, were at the bottom of the Thomas EEOC priority system.

This committee and other committees of this Congress have already explored this issue at great length. The General Accounting Office in 1988 also offered to this Congress a review of, and a study of the lapsed charges.

I think these documents show that senior members of EEO staff strove to inform Judge Thomas of this problem and he refused to listen, he refused to change the procedures. And this led, of course, to the issuance of a subpoena by the Senate Committee on Aging in 1988 and only then did Judge Thomas begin to come clean with the real story of the 15,000 persons whose charges lapsed under his chairmanship.

There are other issues where we feel that Judge Thomas failed to protect the rights of older persons. He supported rules that allowed employers to stop paying into the pension accounts of workers who exercised their ADEA right to work beyond the age of 65. Such workers lost millions of dollars in pension benefits until the Congress, itself, overruled the EEOC on this matter in 1986.

He failed to prohibit the practices of many employers who demanded that older workers waive their ADEA rights in exchange for early retirement benefits in often coercive circumstances. The Congress was forced to repeatedly overrule the EEOC position and finally prohibited this practice in 1990. And he fails to include apprenticeship programs under the purview of ADEA despite the clear language of the act.

In other cases, such as *Lusardi v. Xerox*, *Cipriano v. Board of Education*, and *Paolillo v. Dresser Industries* we find Judge Thomas consistently overruling his own staff in EEOC and taking positions either not to issue complaints, and in fact, to move on the side of employers in court cases.

In summary, Mr. Chairman, responsible persons cannot properly take an oath to enforce certain laws, and once in office work consistently to undermine those very laws. We believe that Judge Thomas' tenure at EEOC demonstrates a consistent and dangerous bias against the interests of older persons in the work force through unwarranted interpretation of law and precedent.

He repeatedly defied the clear instructions of the Congress and required an unprecedented degree of bipartisan congressional oversight and corrective intervention. We further believe that Judge

Thomas consistently interpreted the ADEA from the vantage point of employers contesting the claims of workers seeking fair treatment rather than from the point of neutrality.

Mr. Chairman, the Supreme Court must remain, in the long-term, the Nation's symbol of fairness and justice. Judge Thomas' placement on that Court will surely not buttress that symbolic position in the hearts and hopes of the American people.

Thank you.

[Additional material and the prepared statement of Mr. Schulder follow:]

President  
Eugene Glover  
Silver Spring, MD



## National Council of Senior Citizens

Executive Director  
Lawrence T. Smedley  
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Testimony of Daniel J. Schulder  
Director of Legislation  
National Council of Senior Citizens

Before the

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

on the Nomination  
of Judge Clarence Thomas  
to the  
Supreme Court of the United States

Thursday, September 19, 1991

### 1961 - 1991: Thirty Years of Advocacy for America's Elderly

First Vice President, Dr. Mary C. Mulvey, Providence, Rhode Island    Second Vice President, George J. Kourpass, Washington, DC  
Third Vice President, Dorothy Walker, Detroit, Michigan    Fourth Vice President, Everett W. Lehmann, Washington, DC  
Secretary-Treasurer, Jack Turner, Detroit, Michigan    General Counsel, Robert J. Mozer, New York



In behalf of the National Council of Senior Citizens and our five million members and five thousand local clubs and State Councils, I thank this Committee for this opportunity to state our views regarding the nomination of Judge Clarence Thomas to the position of Associate Justice of the Supreme Court.

As an advocacy organization, we support public and private activities and policies which advance the rights and needs of older persons, their families and their communities. Over the past three decades we have placed ourselves at the side of workers, women, minorities, persons with disabilities, young people and senior citizens in their struggles for economic and social justice and for full and effective civil rights.

Many of our members continue to work and to remain active in trade unions and other work-related organizations. All of our members support the right of citizens to continue to work beyond normal retirement age for as long as they desire or for as long as they must to meet economic needs. We have therefore been enthusiastic supporters of programs designed to assist such older workers and to protect their rights in the workplace.

Since its enactment in 1967, NCSC has supported the Age Discrimination in Employment Act's expansion of rights and protections for working people and its public policy objective to encourage older Americans to continue to work and earn. We agreed

in 1967 with the findings of the Secretary of Labor's report to the Congress urging passage of the ADEA which found that:

1) Many employers adopted specific age limits in those states that did not have age discrimination prohibitions even though many other employers were able to operate successfully in the absence of these limits;

2) In the aggregate, the age limits had a marked effect on the employment of older workers;

3) Although age discrimination rarely was based on the sort of animus motivating other forms of discrimination (e.g., racial, religious, union), age discrimination was based on stereotypes unsupported by objective fact and was often defended on grounds different from its actual causes;

4) The available empirical evidence demonstrated that arbitrary age limits were in fact generally unfounded and that, overall, the performance of older workers was at least as good as that of younger workers;

5) Arbitrary age discrimination was profoundly harmful in at least two ways: It deprived the national economy of the productive labor of millions of individuals and imposed on the U.S. Treasury substantially increased costs in unemployment insurance and Social Security benefits and, it inflicted economic and psychological injury to those workers who were deprived of employment because of age discrimination.

In turn, the Acts' preamble makes it clear that the statute is to be used to encourage the employment of older workers and to provide the machinery to insure that such workers are treated equally and fairly in the terms, conditions, benefits and privileges of such employment.

We believe that Judge Thomas' record as Chairman of the Equal Employment Opportunity Commission marks him as a man whose official actions served to diminish the rights of older workers under the ADEA. We believed that instead of creating a climate in which employers know that discriminatory actions against older workers would be met with swift and sure sanctions and penalties, he sent signals which told employers that it was permissible to discriminate against older workers in pension plans, apprenticeship programs, early retirement programs and in exit incentive programs. Under his administration as Chair of EEOC for eight years, thousands of older workers lost their rights to sue for relief against discriminatory practices by allowing charges to lapse without any or full investigation.

Over a period of years, Judge Thomas' policies resulted in bipartisan Congressional criticism and conflict leading to numerous Congressional interventions to protect the rights of workers and to insure that the clear language and intent of ADEA was enforced.

We believe that a fair reading of Judge Thomas' full record as EEOC Chair does not define him as a person fully committed to the principles of equal justice and independent enforcement of the laws.

Further, we believe that allegations of Judge Thomas' misconduct in administering ADEA are well documented by Committees of the Congress including the Senate Special Committee on Aging, the House Select Committee on Aging, the House Government Operations Committee, the Senate Committee on Labor and Human Resources, the General Accounting Office and the actions of

the full Congress in changing and reversing policies and actions of the Thomas-led EEOC.

We believe that the Committee should thoroughly review these hearings and reports prior to final judgment on Judge Thomas' qualifications for the Supreme Court. To not do so would be a serious abdication of the Judiciary Committee's solemn responsibility to fully explore his qualifications and record. We should note that his position as Chair of the EEOC was his longest public or private job. His record as Chair provides the best material description of his philosophy of law, his responsiveness to the intent of the Congress, his concern for the rights of average persons facing economic hardship and his adherence to consistent principles of justice and equity. We believe that a review of the EEOC record alone will be sufficient to present evidence of his lack of qualifications for the Court.

Finally, Mr. Chairman, we believe that it is critical that this Committee acknowledge that the corrosive influences of age discrimination rank with racism, sexism and religious and ethnic bigotry in its effects on individuals and on the larger society and economy. Both racism and ageism assault the core human dignity of victims. If, in this current recession, you can't find work because you are Black or because you are age 55, the results are the same. You are diminished and spiritually disabled. You are found wanting and vulnerable because of factors beyond your control or desire. That is why NCSC has striven to fight the persistence of age stereotyping that remains a pervasive and virulent aspect of this nation's labor market. That is why we find Judge Thomas' failures to administer the ADEA fairly so

profoundly distressing and deserving of this public call for rejection of his nomination.

#### Lapsing of ADEA Complaints

During Judge Thomas' tenure as Chair, the EEOC caused thousands of older workers to lose their rights and relief under ADEA by its failure to investigate, in a timely fashion, charges of job discrimination. We are not aware of any similar level of nonfeasance involving Title VII or the EPA. Older workers, as a class, were at the bottom of the Thomas-EEOC priority system.

This issue was extensively explored by this Committee at the February, 1990 hearing on Judge Thomas' nomination to the Court of Appeals. The reports of the Senate Special Committee on Aging, under Senator John Melcher in the 100th Congress, provides documentation on the matter of EEOC treatment of ADEA charges including refusals to investigate and the closing of thousands of additional charges not fully investigated. The study by the GAO (GAO/HRD-89-11, October, 1988) provides conclusive evidence of attempts of senior EEOC staff to move Judge Thomas to act on the crisis of unprocessed ADEA charges. He not only refused to reform the EEOC machinery to provide full justice for ADEA complainants, but he also clearly attempted to mislead the Congress regarding the extent of the lapsed charges and the premature closing of charges. As the record shows, it took a bipartisan vote of the Senate Aging Committee authorizing a subpoena to force Judge Thomas to begin to tell the truth about the extent of the scandal affecting upwards of 15,000 persons. Even at his Court of Appeals hearing before this Committee (see attachments--letters of AARP & NCOA to Judiciary Committee), Judge Thomas continued to dissemble and to try to shift blame to state agencies and others.

This public record demonstrates that Judge Thomas was unable or unwilling to assure equitable and complete treatment of older workers' complaints by the EEOC during his tenure. It is not arguably a case of faulty computers or records systems.

The Senate Aging Committee and GAO reports nail the responsibility to Judge Thomas' EEOC desk. That failure translates to a deliberate decision to distort the Congressional intent that older workers were to be provided the full protection of the law. There is no other warranted conclusion.

#### Pension Benefit Accruals

In 1979, when the Department of Labor was administering the enforcement of ADEA, a DOL interpretive bulletin was issued allowing employers with pension plans to stop pension benefit accruals to the accounts of persons working beyond the "normal" retirement age. Thus, the pension benefits of persons working beyond the normal retirement age were effectively frozen--a strong incentive to leave work.

In 1984, EEOC appropriately voted to rescind the policy. In 1985, the EEOC Commissioners approved implementing regulations. However, in 1986, after consultation with the White House, the EEOC reversed itself and let the pension freeze stand. A subsequent court action against EEOC forced a rescinding of the DOL rule, but an order to EEOC to issue rules governing continued pension accrual was reversed on appeal.

The Congress resolved the matter under PL 99-509 (OBRA-1986) requiring employers to continue accrual of benefits under certain conditions. Senator Charles Grassley was author of the Amendment. After months of EEOC and IRS conflict, the final rule governing accrual was issued effective early 1989.

However, the continual shifting of EEOC positions and the conflicts with IRS effectively delayed implementation of the new statute. The net result caused uncertainties regarding the pension rights of many workers.

There have been estimates that the workers affected by EEOC's refusal to rescind the clearly illegal DOC interpretative bulletin are losing \$450 million annually. During this period (1979-1988) the EEOC prevented older workers from bringing private suits to give them full pension credits. Employers who claimed to be acting on the basis of government regulation could not be held liable under the existing EEOC rules.

It was only the intense pressures generated by aging groups and the bipartisan insistence of Members of the Congress that finally resolved the matter belatedly in favor of tens of thousands of older workers whose losses were substantial nevertheless.

#### Unsupervised Waivers of ADEA Rights

The ADEA utilizes the enforcement standards (by incorporation) of the Fair Labor Standards Act under which an employer seeking a worker's waiver of rights or settlement of claims under the ADEA must first secure permission of EEOC or a court. With such protection, older workers can preserve rights to sue under ADEA in situations where employers use undue pressures toward early retirement or additional termination benefits. The forcing out of older workers in the face of company down-sizing is probably the most pervasive form of employment age discrimination after refusal to hire because of age.

In 1985, Thomas proposed sweeping new regulations which would have permitted unsupervised ADEA waivers and which would have

shielded employers from ADEA suits even if it could be shown later that layoffs or early-out arrangements were subterfuges for replacement by younger workers.

This proposal was made in the face of clear ADEA language prohibiting such waivers and with wide-scale acknowledgement of the potential abuse of such waivers. EEOC issued its rule in 1987 after extensive negative comment by the Congress and aging groups.

It is clear that the Congress realized the extent of this Thomas error when it unanimously suspended the rule for fiscal years 1988, 1989 and 1990. Finally, through the Older Workers' Benefit Protection Act (Pub. L. 101-433) the Congress repealed the EEOC rule. Among the Members actively supporting the repeal was Senator Dan Quayle (R-Iowa).

Unfortunately, during this entire period while the full Congress took concerted actions to suspend the rule, EEOC, under Judge Thomas' direction, refused to consider suits involving unsupervised waivers. Such workers thus lost their rights to reinstatement or other compensation.

#### Other Issues

In 1987, Thomas and the Commission abstained from one of the most important age discrimination cases since passage of the Age Act. In Lugardi v. Xerox Corporation, the company laid off 1,300 employees by offering them benefits upon early retirement. The layoff affected a significant portion of the company's older workers, who filed a private class action in federal court. However, many others were not part of the private lawsuit and sought assistance from the EEOC.

EEOC investigators found substantial evidence that Xerox had engaged in a corporate policy to target its older, higher-paid

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workers for termination and to hire younger, lower-paid workers to replace them. According to the older workers, they had accepted the early retirement plan because they were told that otherwise they would be terminated without benefits through a reduction-in-force.

Thomas met with the Commission in closed session to determine whether to file suit against the company. During the meeting, Thomas essentially approved of the company's practice, observing, "This is a standard practice in industry. I don't know why Xerox is the only one we are after." He brushed aside arguments that the threat of a reduction-in-force constituted coercion, saying, "I think it constitutes reality." In addition, Thomas ignored the fact that the early retirement benefits were less than the amount which would have been received if the worker had retired at age 65.

In another case, Thomas not only declined to defend the older worker but also took the employer's side. In Cipriano v. Board of Education, the school board offered early retirement incentives to employees aged 55 to 60, but not to those over age 60. The EEOC general counsel drafted a brief contending that the Board had violated the Age Act and that the early retirement plan was structured to discourage older workers from remaining employed past age 60.

Thomas and another Commissioner believed that the plan was lawful and that forcing the employer to offer equal benefits to older workers would impose too heavy a cost on the employer. The Commission ordered another attorney to rewrite the brief, taking the employer's side.

Older workers representing themselves in Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2d Cir. 1987), succeeded in

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convincing the court that their employer had coerced them into accepting early retirement. However, the EEOC subsequently filed a brief siding with the corporate employer, requesting a modification of the court's opinion that would essentially weaken the Age Act.

Beyond these landmark cases displaying Thomas' anti-older worker biases, the Committee should note the EEOC record regarding the application of disparate impact procedures to ADEA cases. While the ADEA, at Section 1625.7(d), clearly authorizes the use of disparate impact factors in considering complaints, Judge Thomas consistently refused, as EEOC Chairman, to apply disparate impact analysis to such claims. This application of personal theory to EEOC/ADEA procedures considerably weakened EEOC's abilities to pursue class action strategies in behalf of older workers. This position was held despite nearly unanimous decisions of Federal appellate courts applying disparate impact analysis to ADEA charges.

Additionally, despite the lack of any exclusionary language in ADEA, Thomas refused to apply ADEA to apprenticeship training programs. Although the Commission in 1984 voted to rescind an earlier DOL rule excluding such programs from ADEA, EEOC declined to ever issue rules to assure ADEA coverage. In fact, in 1987, EEOC reversed itself and voted again to exclude apprenticeships from ADEA coverage.

#### Summary

Responsible persons cannot properly take an oath to enforce certain laws and, once in office, work consistently to undermine them. We believe that Judge Thomas' tenure at EEOC demonstrates a consistent and dangerous bias against the interests of older

persons in the workforce through unwarranted interpretation of law and precedent. We believe that he failed to administer ADEA in an effective manner and that this resulted in the loss of the rights of thousands of persons whose ADEA claims lapsed. We believe that Judge Thomas repeatedly defied the clear will and instructions of the Congress and required an unprecedented degree of bipartisan Congressional oversight and corrective intervention. We further believe that Judge Thomas consistently interpreted the ADEA from the vantage point of employers contesting the claims of workers for fair treatment.

Because of this record, we question his respect for the rule of law and for his honesty in dealing with the Congress in regard to fundamental rights of citizens. The Supreme Court must remain, in the long term, the ultimate symbol of fairness and justice. Judge Thomas' placement on the Court will not buttress that symbolic position in the hearts and hopes of the American people.



The National Council on the Aging, Inc.

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February 15, 1990

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The Honorable Joseph R. Biden, Jr.  
Chairman  
Committee on the Judiciary  
United States Senate  
SD-224 Dirksen Senate Office Building  
Washington, DC 20510-6275

Dear Chairman Biden:

We are appalled over misleading statements made by EEOC Chairman Clarence Thomas at his confirmation hearing regarding his agency's failure to enforce the federal Age Discrimination in Employment Act for thousands of older Americans.

The Committee confronted Chairman Thomas with evidence that close to 2,000 new age discrimination victims have lost their right to file suit in court because of the failure to process their claims within the two-year statute of limitations. We emphasize that these are new lapses, which have been discovered since the passage of the Age Discrimination Claims Assistance Act in April of 1988. That Act extended protection to thousands of complainants whose ADEA charges were mishandled and neglected by EEOC prior to 1988 and under Mr. Thomas' administration.

The bulk of these complaints were filed with state and local fair employment practices agencies which have contracts with the EEOC to investigate complaints filed under federal anti-discrimination laws. Chairman Thomas and the Commissioners approve every such contract.

Several times during the hearing, Mr. Thomas attempted to shift blame for both past and current lapsed ADEA charges away from him. He stated that an ADEA charge filed with a FEPA is actually filed under state law, which is false. According to the agency's own guidelines, an ADEA charge may be filed with a state-sponsored agency and



*A nonprofit agency working to improve the lives of Older Americans*

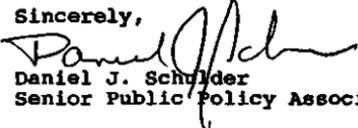
may be accompanied by related claims under state law, but it remains a federal claim and invokes the protection of the federal law.

Mr. Thomas also implied that the EEOC's responsibility for an ADEA charge filed with a FEPA begins only when the FEPA returns the charge for contract credit within 18 months of the date of violation. That is also erroneous. As its rules make clear, the EEOC is required to docket, monitor and review every federal charge handled by the FEPAs. Upon the initial filing, the charges are entered into EEOC's national database, and the FEPA investigations are supposedly monitored by the EEOC's field offices.

It is simply amazing that Mr. Thomas proffers these excuses for failure to enforce the law. There is no question that the EEOC retains ultimate responsibility for FEPA-processed ADEA charges. Contrary to what Mr. Thomas may have the Committee believe, the EEOC cannot contract away the ADEA rights of older Americans. The FEPAs act directly as agents of the EEOC in processing federal charges.

We have witnessed Mr. Thomas's capacity for evasion before Congressional committees on other occasions, and we believe that he is being less than candid with the Judiciary Committee about the extent of his agency's responsibility for the newly lapsed ADEA charges. During the same hearings, he misrepresented the facts to Senator Heflin regarding the number of charges lapsing in prior years. He stated that only 900 had lapsed, when his own agency reported to the Senate Aging Committee that possibly 13,000 charges had lapsed. (The actual number is unknown because of the agency's prior policy of destroying files six months after closure.)

We believe that it would be a serious mistake to place on the federal bench an official who has repeatedly shown a disregard of the law and a willingness to mislead the Committee on important points of fact. On behalf of older workers and those who wish to preserve and advance their rights under law, we urge you not to confirm this nominee.

Sincerely,  
  
Daniel J. Schuyder  
Senior Public Policy Associate



February 16, 1990

The Honorable Joseph Biden, Chairman

The Honorable Strom Thurmond

Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman, Senator Thurmond and Members of the Committee:

The American Association of Retired Persons (AARP) requests that this letter be made part of the record of the confirmation hearings on the nomination of Clarence Thomas to the U.S. Court of Appeals. The purpose of this letter is to correct inaccurate statements made by Mr. Thomas at his confirmation hearing on February 6, 1990, and to express AARP's serious concern about his commitment to enforcing the law without regard to his personal wishes.

Mr. Thomas's testimony reveals a fundamental lack of understanding of both the laws he has been charged with enforcing for the past eight years and the regulations and procedures of the agency he has chaired. Taken as a whole, Mr. Thomas's testimony exhibits the same disregard for the rights of older workers that we have seen during his tenure at the EEOC.

The areas of Mr. Thomas's testimony that evidence these problems include:

- His incorrect assumption that the loss of federal civil rights due to agency inaction can be excused by the existence of a similar state law.
- His refusal to accept responsibility for, and his misstatements regarding, the EEOC's continued failure to process on a timely basis charges under the Age Discrimination in Employment Act (ADEA). As a result, thousands of older workers have lost their rights under the law.
- His misstatements of the case law to erroneously justify EEOC's rules on unsupervised ADEA waivers.

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

Louise D. Crooks *President*

Horace B. Dees *Executive Director*

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- His misstatements regarding the EEOC's obligation to rescind admittedly illegal regulations that permitted employers to deny older workers full and fair pension benefits.

The inaccuracies in Mr. Thomas's testimony are discussed in more detail below.

**1. Mr. Thomas's Testimony on Lapsed Federal ADEA Charges Processed by FEPAs.**

AARP was shocked to learn at the February 6, 1990, confirmation hearing that the EEOC has continued to forfeit the rights of thousands of older workers by failing to process charges brought under the ADEA within the required two year statute of limitations.

Even more disturbing is Mr. Thomas's assumption that the lapsing of federal ADEA claims is not a problem for victims of age discrimination because they retain similar state law claims. This is a remarkable -- and incorrect -- view of federal law for someone who has been charged with enforcing fundamental federal rights and who has been nominated to become a federal appeals court judge.

When the problem of lapsed charges was initially discovered in 1987 by the Senate Special Committee on Aging, Mr. Thomas personally committed himself to resolving a situation that he called "totally inexcusable." Apparently, he has made little effort to do so. Even more disturbing, Mr. Thomas now seeks to avoid responsibility for the EEOC's continued malfeasance by divorcing himself and the EEOC from the actions of the state and local agencies that processed these charges on behalf of the Commission.

In his testimony, Mr. Thomas acknowledged that for the period from April 6, 1988 to July 27, 1989, more than 1500 charges of age discrimination were not processed by the agency within the ADEA's two year statute of limitations. It is unclear whether the charging parties received notice of this problem. The older workers who filed these charges have lost their right to pursue their claims in federal court under federal

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law.<sup>1</sup>

When asked to explain this situation, Mr. Thomas asserted that the overwhelming majority of the lapsed charges were handled by fair employment practice agencies (FEPAs), which are state and local agencies under contract with EEOC. He asserted that the lapsing of charges by FEPAs is not significant because the state and local agencies only handle claims filed under state law, not federal law, and the state claims are not subject to the two year statute of limitations. Mr. Thomas insisted repeatedly that these were "state claims," not federal claims. He stated that the EEOC is not involved or responsible for ADEA charges filed with FEPAs until and unless the FEPA investigates and reports the charge to the EEOC within 18 months of the discriminatory act.

Mr. Thomas is incorrect on every point. As he must -- or should -- know:

- A state law claim in no way substitutes for federal rights, and in no way diminishes the EEOC's obligation to vigorously protect older workers under the ADEA.
- The EEOC contracts with the FEPAs to receive and investigate federal ADEA charges as the EEOC's agent. These charges remain subject to the ADEA's two year statute of limitations for filing a lawsuit;
- The EEOC is informed of every federal charge filed with a FEPA at the time the charge is filed;
- The EEOC remains responsible for ensuring that the federal charges are investigated in a timely and thorough manner, and for monitoring the work of the FEPAs;

As discussed below, federal law, the EEOC's regulations, the terms of its worksharing agreements with the FEPAs, and EEOC

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<sup>1</sup> Because these charges lapsed after April 6, 1988, they are not covered by the Age Discrimination Claims Assistance Act, passed by Congress to restore, for 18 months, the rights of certain older workers who had lost their claims due to the EEOC's previous failure to meet the two year statute of limitations.

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documents establish these basic principles. Mr. Thomas's testimony was not only misleading, but revealed an astonishing lack of understanding of, and concern for, the protection of older workers' rights under the law.

- A. A state law claim in no way substitutes for federal rights, and in no way diminishes the EEOC's obligation to vigorously protect older workers under the ADEA.

Perhaps the most astonishing aspect of Mr. Thomas's testimony is his assumption that state claims are an adequate substitute for the loss of federal rights. He belittled the problem of thousands of lapsed federal ADEA charges by noting that a complaining party retains a state law claim if the federal charge is lost.

The existence of a state law claim in no way excuses the EEOC's failure to protect older workers' rights under the ADEA. Congress enacted the ADEA in order to provide older workers with a federal cause of action in federal court. A state law claim -- no matter how beneficial to the charging party -- is no substitute for the federal right.

It is also untrue that state laws provide comparable rights and relief to the federal law. In fact, state laws often provide more limited relief to older workers for age discrimination than the ADEA. For example, the ADEA permits a private right of action 60 days after a charge is filed, jury trials, liquidated damages, and attorney's fees to a prevailing plaintiff. In contrast, some state laws provide:

- New York: If an older worker pursues an age discrimination charge with the New York FEPA, the older worker loses his or her private right of action to pursue the state claim in state court. The worker is limited solely to the state administrative process, which may take as many as seven years to complete and which is only subject to a deferential standard of judicial review. There is no right to a jury trial, no right to attorney's fees and no right to liquidated damages.
- Maryland: Older workers have no private right of action to bring a claim of age discrimination in court, but are limited to the state administrative process, which is subject to deferential judicial

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review. Neither attorney's fees nor liquidated damages are awarded.

An older worker's rights under the ADEA should not and must not depend upon whether the charge was filed with the EEOC directly or with a FEPA designated as the EEOC's agent. Nonetheless, that is precisely what appears to have happened during Mr. Thomas's tenure as EEOC Chairman.

**B. FEPAs handle federal claims as EEOC's agent.**

In his testimony, Mr. Thomas repeatedly asserted that, "The cases filed with the state agencies are filed under state law." Each time he was asked whether federal charges are filed with FEPAs, he responded by restating, "They are filing them under state statute." As Mr. Thomas must or should know, this is incorrect.

The EEOC certifies state and local agencies to become FEPAs after reviewing analogous state laws on age (as well as race, sex, national origin and religious) discrimination, and investigation, conciliation and prosecution procedures. The EEOC and the FEPAs then enter into annual "worksharing" agreements, which designate state and local agencies as the EEOC's agent for the receipt and investigation of federal charges. (In most instances the complaining party has also filed a state law charge based on the same facts, which the FEPA will investigate in any event.) The sole purpose of the EEOC-FEPA relationship is to allow state and local agencies to receive and investigate federal claims.

Title 29 C.F.R. part 1626 of the EEOC's regulations on the ADEA defines the parameters of this relationship. Section 1626.10(a) explicitly provides that the EEOC may "engage the services of [FEPAs] in processing charges assuring the safeguards of the federal rights of aggrieved persons," (emphasis supplied).

The worksharing agreements reiterate this point. For example, the current agreement between the EEOC and the Maryland Commission on Human Relations makes clear that the EEOC has jurisdiction over ADEA charges, and that the "EEOC by this Agreement designates and establishes the FEPA as a limited agent of EEOC for the purpose of receiving charges on behalf of EEOC . . ."

The handling of federal claims by FEPAs in no way modifies or

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tolls the ADEA two year statute of limitations, irrespective of a state law's more generous statute of limitations. Regardless of which agency initially receives and investigates the federal charge, an ADEA claim must be filed in court within two years of the discriminatory act or the federal cause of action is forever lost.<sup>2</sup>

- C. The EEOC is notified of every ADEA charge filed with a FEPA at the time the charge is filed.

In his testimony, Mr. Thomas implied that the EEOC may not know about the charges handled by FEPAs and, therefore, cannot be held responsible for the lapsing of those claims. He stated that charges not reported to the EEOC within 18 months are outside the scope of the worksharing agreement and, therefore, are not the obligation or responsibility of the EEOC. ("[I]f a state agency receives a charge and that charge is not to us by 18 months from the date of violation, that charge is not under contract with EEOC. We have to have that charge in time to process under our statute.")

Mr. Thomas is again incorrect. The EEOC is notified of all ADEA charges at the time they are filed with the FEPA. The EEOC cannot claim ignorance about these charges, nor use this as an excuse for failing to exercise its responsibility to insure that the charges are processed in a timely manner.

The worksharing agreement permits an older worker to file his or her federal age discrimination charge with either the EEOC or a FEPA. If the latter course is followed, the FEPA notifies the EEOC by sending a copy of the charge to the relevant EEOC district office. In fact, the worksharing agreements expressly require the FEPA to advise the EEOC of the charge within ten days of its receipt. Furthermore, the FEPA may also enter the federal charge into the national

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<sup>2</sup> The FEPAs sole function with respect to the federal charges is to receive the charge and conduct an administrative investigation. When it reaches a determination of cause or no cause, it reports its finding to the EEOC. The FEPA's finding is then subject to EEOC review, during which it receives "substantial weight." To pursue litigation, the EEOC uses the same procedures as when the charge was initially investigated by one of its district offices. For example, the Office of General Counsel must review the charge and determine whether or not to recommend litigation.

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computer data base -- providing a second means of notification to the EEOC.

The EEOC, therefore, has the requisite knowledge for monitoring the FEPAs' processing of federal claims and for ensuring that the two year statute of limitations does not lapse. The 18-month period for processing by the FEPA is simply the baseline by which the FEPA's work is judged for purposes of payment.<sup>3</sup> It does not obviate the EEOC's responsibility to enforce the ADEA -- and to insure that its agent, the FEPA, enforces the ADEA. Indeed, a FEPA that repeatedly exceeds the 18-month baseline can be reviewed for nonfeasance and possible decertification.

- D. The EEOC is responsible for ensuring that federal charges handled by FEPAs are processed in a timely manner.

Contrary to Mr. Thomas's testimony,<sup>4</sup> the EEOC retains jurisdiction over all federal charges filed with a FEPA. The EEOC retains the responsibility and obligation to ensure that all federal claims handled by FEPAs are processed within the two year statute of limitations.

The EEOC's regulations at 29 CFR parts 1626.10(a),(c) make clear that the worksharing agreements not only do not relieve the Commission of its responsibilities with regard to ADEA charges filed with a FEPA, but in fact obligate the Commission to monitor the FEPAs and "promptly process charges which the state agency does not pursue." Obviously, these regulations contradict Mr. Thomas's repeated statements that EEOC's responsibilities extend only to charges reported by FEPAs to the EEOC within 18 months.

The worksharing agreements also make clear the EEOC's continued responsibility with regard to the federal claims.

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<sup>3</sup> FEPAs are paid by the EEOC for investigating federal charges only if the FEPA reports its findings within 18 months. This deadline is an acknowledgement, by the EEOC, that the federal charges must be handled in a timely fashion.

<sup>4</sup> In his testimony, Mr. Thomas repeated said, "We do not supervise state and local FEPAs. . . . [I]f a state agency receives a charge and that charge is not to us by 18 months . . . that charge is not under contract with EEOC."

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See e.g., Paragraph 1e: "It is understood that this Agreement does NOT in any way reduce the jurisdiction conferred upon either party to this Agreement, or limit the rights and obligations of the respective parties." (Emphasis supplied). Even more explicit is the section entitled "Timely Processing of ADEA Charges." This section establishes the EEOC's right to review any ADEA charge handled by the FEPA, and to take over the investigation of that charge when over one year has passed from the date of the alleged violation."

EEOC internal documents also reveal that, contrary to Mr. Thomas's repeated assertions that the EEOC does not "supervise" or "regulate" the FEPAs processing of federal claims, the Commission holds itself responsible for monitoring the FEPAs and ultimately for the federal charges they handle. For example, a "Field Trip Report," resulting from a review by EEOC headquarters of the Miami District Office, states that the EEOC district office must be able to monitor federal charges handled by FEPAs "to ensure that charging party rights are not eroded by the running of the statute of limitations."<sup>6</sup> Similarly, a March 14, 1988 memorandum from EEOC's Director of Field Management Programs (West) to the Director of the Office of Program Operations, expresses concern over the EEOC Chicago district office's monitoring of ADEA charges handled by the Illinois Civil Rights Commission (a FEPA).

It is deeply troubling to us that after eight years as Chairman, and only two years since he pledged to solve the problem of unprocessed ADEA cases, Mr. Thomas is unaware of the most fundamental aspects of the EEOC's relationship with its agents, the FEPAs, and unwilling to accept responsibility for the repeated failure of the FEPAs -- and hence the EEOC -- to adequately protect the rights of older workers under the ADEA. His (incorrect) insistence that the EEOC does not

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<sup>5</sup> In addition, paragraph 8 of the worksharing agreements establishes that if the FEPA determines it does not have the resources to pursue a federal charge, it must notify the Commission.

<sup>6</sup> Field Trip Report, Field Management Programs - East, EEOC Miami District Office (August 8-12, 1988).

<sup>7</sup> See Hearing before the Special Committee on Aging, 100th Cong., 2d Sess. (June 23, 24, 1988) at 966.

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"supervise" or "regulate" the FEPAs may in fact highlight the cause of this continuing problem: the EEOC under Mr. Thomas has made no effort to insure that the FEPAs are fulfilling the terms of their worksharing agreements by processing ADEA charges in a timely and thorough manner.

## 2. Mr. Thomas's Testimony Regarding Unsupervised Waivers.

At the February 6, 1990 confirmation hearing, Mr. Thomas was asked to explain the legal basis for the EEOC's rule permitting unsupervised ADEA waivers, given Supreme Court case law that invalidates such waivers. Rather than answer this question, Mr. Thomas repeatedly stated that EEOC's General Counsel had recommended adopting the regulations. When pressed, Mr. Thomas cited a series of lower court decisions permitting unsupervised waivers in limited circumstances.<sup>8</sup>

The appellate court cases cited by Mr. Thomas provide little if any support for the rules issued by the EEOC and subsequently suspended by Congress. First, none of these cases had been decided when the EEOC first proposed its regulations in October 1985. Indeed, the only decision on point prohibited unsupervised waivers.<sup>9</sup> Second, only two of the cases had been decided before the rules were issued in final form in July 1987 and, in both these cases, the courts relied at least in part upon the Commission's proposed rules

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<sup>8</sup> In Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court expressly held that the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act, and the case law interpreting those provisions. The Supreme Court has held that section 16(c) of the Fair Labor Standards Act, which is incorporated into the ADEA, invalidates unsupervised waivers. See Brooklyn Bridge v. O'Neill, 324 U.S. 697 (1945). The rules published by the EEOC -- and subsequently suspended by Congress -- contradict these cases.

<sup>9</sup> Runyan v. National Cash Register, No. 83-3862 (6th Cir. April 22, 1985) (rev'd en banc 1986).

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and/or an EEOC brief in reaching their decisions.<sup>10</sup>

Third, the two courts carefully and specifically limited their decisions to waivers obtained in settlement of a bona fide factual dispute.<sup>11</sup> The EEOC's rules are not similarly limited, but would permit waivers in all circumstances.

When asked to explain this discrepancy, Mr. Thomas twice misstated the case law by asserting "no court has limited unsupervised waivers to bona fide factual disputes that I know of." Mr. Thomas is wrong. In fact, in Runyan v. National Cash Register, 737 F.2d 1039 (6th Cir 1986, en banc) -- the case upon which the EEOC placed primary reliance when issuing its final rule -- the Sixth Circuit explicitly stated that its holding was limited to waivers of bona fide factual disputes.<sup>12</sup> In Borman v. AT&T Communications, Inc., 875 F.2d 399, 404 (2d Cir. 1989), the court also held that the case involved a bona fide factual dispute. The other appellate decisions cited by Mr. Thomas are similarly limited by their facts, their holdings, or are simply inapplicable to the issue.<sup>13</sup>

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<sup>10</sup> See Runyan v. National Cash Register, 787 F.2d 1039, 1045 (6th Cir. 1986, en banc); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987).

<sup>11</sup> Runyan, 787 F.2d at 1044; Cosmair, 821 F.2d at 1091 (specifically adopting the reasoning of Runyan).

<sup>12</sup> The Runyan court noted, "The dispute is not over legal issues such as the ADEA's coverage or its applicability. Rather, the parties contest factual issues concerning the motivation and intent behind National Cash Register's decision to discharge Runyan. Accordingly, we hold that an unsupervised release of a claim in a bona fide factual dispute of this type under these circumstances is not invalid." 787 F.2d at 1044.

<sup>13</sup> See Shaheen v. B.F. Goodrich Co., 873 F.2d 105, 106 (6th Cir. 1989); Cirillo v. ARCO Chemical Co., 862 F.2d 448, 450 (3d Cir. 1988). In addition, other appellate decisions permitting unsupervised waivers also are limited, by their facts, to a bona fide factual dispute. See e.g. Cosmair, supra; Coventry v. U.S. Steel Corp., 856 F.2d 514, 516-17 (3rd Cir. 1988).

A fifth case cited by Mr. Thomas, Nicholson v. CPC International Inc., 877 F.2d 221 (3d Cir. 1989), does not involve an unsupervised

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Mr. Thomas's refusal to be guided by Supreme Court case law and his misstatements of the facts and decisions in the lower court cases cast serious doubt upon his ability or commitment to enforcement of the law regardless of his own personal preferences and interpretations. As many of the Senators indicated in the questions to Mr. Thomas, it is imperative that a federal judge be willing to accept and enforce the law as passed by Congress, and interpreted by the Supreme Court, notwithstanding personal disagreement with the law or its interpretation.

**3. Mr. Thomas's Testimony Regarding Pension Benefit Accrual.**

Mr. Thomas's testimony at his confirmation hearing paints an inaccurate picture of the EEOC's actions and authority with respect to the issue of nondiscriminatory pension benefit accruals and contributions for older workers. Specifically, Mr. Thomas mischaracterized the law and the EEOC's conduct with regard to its refusal to rescind an admittedly illegal Interpretive Bulletin (IB) that permitted employers to freeze the pension accounts of persons who worked past age 65.

Mr. Thomas testified that in order to rescind the IB, the EEOC had to comply with the formal procedures of rulemaking, including inter-agency coordination, a regulatory impact analysis and OMB approval. According to Mr. Thomas, these rulemaking requirements and the actions of other agencies prevented the EEOC from either rescinding the IB or issuing new regulations requiring post-65 pension benefit accrual. ("In essence, what happened to the pension accrual rulemaking was it was bogged down in the coordination process . . . we had to engage in rulemaking . . ." Rescission "is a major rulemaking . . . we could not simply withdraw the IB.")

This is incorrect and, in our view, misleading. As noted by both Senator Metzenbaum and Mr. Thomas at the hearing, the EEOC's Acting Legal Counsel at the time advised Mr. Thomas that the EEOC could rescind the IB without running afoul of rulemaking requirements. Moreover, even if formal rulemaking were required, there were interim steps available to the

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waiver of ADEA rights.

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Commission to alleviate the considerable harm caused to, and cost imposed upon, older workers by allowing the admittedly illegal IB to remain in effect.<sup>14</sup>

- A. EEOC's Acting Legal Counsel advised Chairman Thomas that rescission of the IB did not require formal rulemaking.

The Office of Legal Counsel is responsible for all rulemaking within the EEOC. As documented in a contemporaneous memorandum, the Acting Legal Counsel advised Mr. Thomas that the Commission did not need to engage in formal rulemaking procedures to rescind the IB. Under Executive Order 12291, only if the proposed agency action is estimated to have an annual effect on the economy of \$100 million or more is it designated a major rule requiring a regulatory impact analysis and submission to OMB. The Acting Legal Counsel determined that rescission of the IB would not have the required economic impact and thus the formal requirements of Executive Order 12291 did not apply.<sup>15</sup>

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<sup>14</sup> In June 1984, the EEOC voted to rescind the IB, finding that it violated the ADEA. In March 1985, the EEOC reaffirmed its decision. However, at no time did the EEOC actually take the required steps to rescind the admittedly illegal IB or publish replacement regulations for notice and comment. It did not rescind the IB until subject to court order.

The EEOC's refusal to rescind the IB also prevented older workers from asserting their rights in court. Under the ADEA, an employer who relies upon a written agency action may have a "good faith" defense to a charge of discrimination if he demonstrates reliance upon the IB -- even if the challenged conduct is discriminatory and the agency action is subsequently found invalid.

<sup>15</sup> The Acting Legal Counsel's position is supported by the fact that rescission of the IB would not require employers to take any action, nor would it release employers from any obligation.

Although studies showed that older workers suffered a loss of approximately \$450 million in annual pension benefits due to the illegal practice of freezing pension accounts at age 65, regardless of whether the worker continued to work the cost to employers of

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In his testimony, Mr. Thomas stated that he believed his Acting Legal Counsel to be wrong. He stated that he obtained a "second opinion" which reached the opposite conclusion. Mr. Thomas failed, however, to identify who gave the second opinion and when -- or why -- it was solicited.<sup>16</sup>

Mr. Thomas's willingness to follow or not follow the advice of counsel seems arbitrary, at best. For example, Mr. Thomas's rejection of his Legal Counsel's advice in this regard must be contrasted with his repeated reliance upon the advice of the (Acting) General Counsel and the Legal Counsel with regard to regulations on unsupervised ADEA waivers (see discussion above). At the confirmation hearing, when asked for the legal basis for the EEOC's regulations on unsupervised waivers, Mr. Thomas emphasized again and again that EEOC's General Counsel initiated the controversial regulations and that the regulations had the support of the Legal Counsel. There appears to be no reason for his reliance upon counsel's advice in one instance and his rejection of it in the other.

- B. The EEOC could have taken action short of rulemaking to protect the rights of older workers to fair and nondiscriminatory pension benefits.

Mr. Thomas also failed to acknowledge that even if full rulemaking procedures were required for the rescission of the illegal IB, the EEOC had the authority to provide interim relief to older workers. The EEOC had the authority to issue an opinion letter stating that it would no longer recognize the IB as a good faith defense available to an employer charged with discrimination in pension benefits. The EEOC, however, not only failed to do this, but also repeatedly

continuing pension contributions and accruals beyond normal retirement age was minimal at most. Comm. Pub. No. 97-323; An Analysis of the Costs of Pension Accrual After Age 65 (A. Rappaport, W. Mercer), U.S. House of Representatives, Select Committee on Aging, 97th Cong., 2d Sess (May 1982).

<sup>16</sup> Indeed, Mr. Thomas stated that "we have gotten a second opinion after the document request," which would be January-February 1990. This, of course, means that the "second opinion" could not have formed the basis for his decision four and five years ago.

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dismissed charges filed by older workers who were denied post-65 pension benefit accrual even after the Commission determined that this practice was illegal.

The EEOC has previously issued opinion letters interpreting the requirements of the ADEA, thereby establishing agency policy prior to or outside the "informal" rulemaking process. For example, in December 1983, it approved for publication an opinion letter explaining an employer's obligation to rehire retired employees under the ADEA.<sup>17</sup>

- C. The Inter-agency Coordination process was completed by the time the EEOC voted to rescind the old regulations and issue the new ones in March 1985.

The EEOC had been examining the IS and the issue of pension benefit accrual since it first assumed jurisdiction over the ADEA in 1979. In 1983, it issued an Advanced Notice of Proposed Rulemaking and in June 1984 it voted to rescind the IS and instructed staff to prepare new rules. In March 1985, the EEOC voted again to issue the new rules. The issue had been discussed repeatedly with other agencies and departments during this entire period. The inter-agency coordination process was certainly complete when the Commission was sued, in June 1986, to rescind the IS and issue the new regulations.

Mr. Thomas has once again attempted to evade responsibility for his failure to protect older workers' rights under the ADEA by imposing blame upon another party. In this instance,

as in the case of the lapsed charges, the blame must rest squarely with the Commission and Mr. Thomas.

In any hearing, there will always be some unintentional misstatements of fact or law. Here, however, the misstatements throughout Mr. Thomas's testimony cannot be excused as uninformed. The issues discussed above, and in

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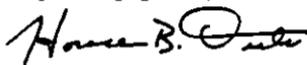
<sup>17</sup> EEOC Opinion Letter on Obligation to Rehire Retired Employees under Age Discrimination in Employment Act, (approved December 13, 1983), No. 60, published by The Bureau of National Affairs, Jan. 1984.

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our previous letter to Chairman Biden and Senator Thurmond (of January 26, 1990), have consistently and publicly been before the Congress and the EEOC and involve basic operating procedures of the Commission.

During Mr. Thomas's tenure as Chairman, Congress has repeatedly been forced to step in to overrule or substantially modify the EEOC's actions and conduct with regard to its enforcement of the ADEA. What is most disturbing to AARP, and we hope would be of greatest concern to the members of the Judiciary Committee, is that Mr. Thomas's testimony and record reveal not only a failure to enforce the law as passed by Congress, but, at best, a lack of concern for the working Americans protected by the Age Discrimination in Employment Act. The record of the hearing, and Mr. Thomas's record as EEOC Chairman bring into question whether he will act differently as a federal judge.

Very truly yours,



Horace B. Deets

The CHAIRMAN. Thank you.  
Ms. Axford.

#### STATEMENT OF NAIDA AXFORD

Ms. AXFORD. Thank you.

Mr. Chairman, members of the committee, thank you for this privilege. I would like to address three points—the obstacles that individual employees have to getting their jobs done, earning a living, and pursuing happiness.

The concern that the American public must have about this committee's inability to receive straight answers from this candidate and the necessity for an open forum for discussion of issues, issues that will be in the employment area, critical issues to the life and liberty of American workers.

Our membership of the National Employment Lawyers Association—we call ourselves NELA—is made up of lawyers who represent the people who are hurt when employment laws are violated. The people that we talk to call us, come to see us, seek out legal advice, and legal counsel because they are confused, disoriented, anxious, nervous, depressed, they are losing weight, they have difficulty sleeping, they are unable to concentrate, they have lost their jobs, they have lost their will and they need help.

We have to send them to the Equal Employment Opportunity Commission in order to have certain laws enforced and I believe that our lawyers are in a prime position to tell you what happens to those people when they go to an agency that does not administer the law, as you, the Congress has created it.

The laws protecting our clients include the title VII, the Age Discrimination and Employment Act, pension laws, OSHA, wage and hour regulations and a variety of issues that are probably going to be addressed by the future Court. There are fundamental employment rights that we consider basic—a safe work place, the right to organize, the retention of fundamental rights so that our clients, your constituents do not have to exchange their liberties and their freedoms for a day's wage.

We would like to have our clients have a Supreme Court that will enforce employment contracts and role expectations in a work place. The civil rights that have been discussed by members coming before this panel may be in jeopardy. And employees are now, with the kind of technology that we face, looking at potential unreasonable encroachments on privacy.

To me, as an employment lawyer representing individual employees, I can liken this situation to those of any American worker. As you can see, Justice Thomas is in an interview process for a job, and just like our employees and anyone who goes for a job, there has been an employment application filled out and filed with the Senate. That employment application lists all of his jobs, all of his information about where he lives, et cetera, just like any American worker.

But unlike any American worker, the employment evaluations that come before a job interview are, in this case, recorded in the annals of many of the congressional reports. And as was noted by one of the people who testified this morning, Judge Thomas ap-

peared before committees 56 times, reporting about controversial, highly critical efforts about his experience before the Equal Employment Opportunity Commission role of leadership.

I urge you to take a look at his job performance. The President has recommended a candidate to you. He has filed his application and now you are in the interview process. You have talked with him and you are looking at the people who make recommendations to you, those of us who can come. I urge you to ask yourself, in this interview process, who is in charge here?

If an applicant came to any other employer and said that they would not answer questions, it would be extremely disturbing to the potential employer. I think the American public is very disturbed. Your constituents deserve some more answers.

We all have common enemies. Those of you who support this candidate, those of us who do not support this candidate—those enemies are fatigue, pressing matters, rush, urgency, competing priorities, family and personal needs. And there are even greater enemies—lack of faith in the legal process, suspicion of Government, and one another, and fear of being harmed.

But we are family and this is a Government of balance and separation of powers. We are governed by a system which recognizes, tolerates and encourages diversity of ideology. Uniformity of thought is the antipathy of our independent minds.

Please let us know, there are many issues likely to be addressed by this Court—privacy rights, dress codes, sexual harassment, disabilities, limitations of damage awards—many, many issues in the employment setting.

But it is not about agreeing with this judge's views. We have a right to know, your constituents have a right to know. The process already exists. I implore you to slow down, take stock, take your time, it is a big decision. This man will have this job for 40 years or more perhaps. Only the hand of God can remove him from his position.

I urge you, ask him more questions, bring him back, make him tell us, make him tell your constituents. Sirs, this has been a deeply moving experience to see the civil rights community bitterly divided on this issue. You need to bring him back, make him answer the questions. And we hope and pray, many of us on this panel, that he will change our minds.

Thank you.

[The prepared statement of Ms. Axford follows:]



**NATIONAL  
EMPLOYMENT  
LAWYERS  
ASSOCIATION**  
(Advocates for Employee Rights)

**TESTIMONY OF NAIDA B. AXFORD IN  
OPPOSITION TO THE APPOINTMENT OF  
JUDGE CLARENCE THOMAS  
TO THE UNITED STATES  
SUPREME COURT**

The next appointee to the Supreme Court will play a pivotal role in determining whether a half century of law establishing the rights of employees to be protected against arbitrary and discriminatory employment practices will be rescinded. As Justice Thurgood Marshall warned in his final dissenting opinion, the Court's current majority has launched a "far-reaching assault upon this court's precedents" and the majority has "sent a clear signal that essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to re-examination."<sup>1</sup> It is therefore critical that the person nominated to

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<sup>1</sup>Payne v. Tennessee, 59 U.S.L.W. 4814 (New. S. June 25, 1991) (No. 90-5721)

assume the seat vacated by Justice Marshall be committed to a judicial philosophy which values the established rights of employees to be free from discriminatory treatment.

The National Employment Lawyers Association ("NELA") believes that Judge Clarence Thomas is clearly not the best person for the position. NELA is a non-profit professional organization comprised of over 1,000 lawyers in 48 states and the District of Columbia who represent employees in work related matters. As a group, NELA attorneys have represented hundreds of thousands of individuals seeking equal job opportunities. It is one of the few organizations dedicated to protecting the rights of all employees who rely on the courts for protection to be free from discrimination and wrongful discharge. We are, therefore, deeply concerned about Judge Thomas' lack of commitment to the constitutional and statutory rights of employees previously established by the United States Supreme Court.

In the coming years, the Supreme Court will be called upon to rule on a myriad of employee rights issues. Over the last two years, the Supreme Court substantially cut back on protection afforded the American working population against employment

discrimination.<sup>2</sup> However, many issues are left open. For example, there will be major cases raising the question of whether employees can be coerced into waiving their federally protected civil rights in order to obtain a job. At its last session the court held that victims of age discrimination can prospectively waive their rights to statutory protection under the Age Discrimination Act (ADEA). There have already been attempts to expand that to permit waivers of rights established by Congress under Title VII and under § 1981 and § 1983 of the Civil Rights Act, and ultimately the Supreme Court will be called upon to act. Another issue of significance will be the reach of the Supreme Court's decision in Patterson. There is now a split in the circuit courts as to whether Patterson reaches termination cases. The Court, in the future, will be called upon to rule on that issue. At this critical point in the history of the Court it is, in our view, crucial that the person appointed have a fair and open mind to the issues that will be presented.

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<sup>2</sup>Wards Cove Packing Company v. Atonio, 109 S.Ct. 2115 (1989). Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). Lorance v. AT&T Technologies Inc., 109 S.Ct. 2261 (1989). Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989); Martin v. Wilkes, 109 S.Ct. 2180 (1989); Gilford v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991)

Judge Thomas' prior record, particularly his eight year tenure as Chair of the United States Equal Employment Opportunity Commission ("EEOC"), demonstrates clearly his hostility toward the protective legislation previously passed and interpreted by the Supreme Court. As chief enforcer of the federal civil rights statutes, he undermined the effective implementation of those laws, because of his personal disagreement with Supreme Court interpretation of his statutory mandate. The following is a brief summary of Judge Thomas' record which NELA believes demonstrates a judicial philosophy unsuited to elevation to the highest court of the land.

#### QUALIFICATIONS FOR THE JOB

There have been only 105 Supreme Court Justices since the establishment of the court. Elevation to that prestigious and powerful position is reserved for those persons who have a demonstrated record of significant national public service, legal scholarship or judicial experience. Judge Thomas' brief public career lacks these essential qualifications.<sup>1</sup> Judge

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<sup>1</sup>Indeed at the time of his nomination to the Circuit Court of Appeals for the District of Columbia, the ABA merely found Judge Thomas "qualified" and denied him the higher ranking of "highly qualified" for that lower court position. When faced with his nomination to the Supreme Court, the ABA again rated him only "qualified" and overall gave him lower ratings than Judge Bork. A nominee who is not found most qualified for the position of Court

Thomas has extremely limited judicial experience, having served only about 17 months on the Court of Appeals for the District of Columbia. During that time, he has written only 17 opinions, all of which were opinions in non-controversial cases in which the decision of the court was unanimous.

His only other significant legal experience was as Chair of the United States Equal Employment Opportunity Commission from 1982 through 1990. As will be discussed more fully below, the Agency under his administration refused to enforce the civil rights laws under its jurisdiction as those laws were interpreted by the Supreme Court. Judge Thomas simply does not have the broad range of experience that would qualify him for the highest judicial appointment. Nor has he demonstrated respect for Constitutional principles and established legal precedents to qualify him for this esteemed position.

**CHAIRMANSHIP OF THE UNITED STATES  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

The EEOC is the agency established to enforce federal laws forbidding employment discrimination based on race, sex, national origin, age, and religion. During his administration, Mr. Thomas demonstrated an unwillingness to enforce those laws

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of Appeals Judge can certainly not be viewed as the most qualified candidate for the United States Supreme Court.

vigorously. Among his more egregious failings was allowing 13,000 age discrimination claims to lapse and at the same time trying to hide those facts from the United States Congress.

Further, Judge Thomas routinely criticized and complained about the oversight committee of Congress charged with monitoring the work of the EEOC. When first asked by the Senate's Special Committee on the Aging about the number of ADEA<sup>4</sup> cases whose statute of limitations had lapsed, Mr. Thomas reported that only 78 such cases existed. He complained that the Senate Committee staffers were subpoenaing volumes of records and that this was an expense to the EEOC.<sup>5</sup> However, only after constant probing, including the use of subpoenas to obtain EEOC records, was it revealed that over 13,000 such lapsed cases existed.<sup>6</sup> It took special legislation of Congress to restore the rights of those workers whose claims the EEOC under the stewardship of Clarence Thomas, had allowed to lapse.

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<sup>4</sup>Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.

<sup>5</sup>Speech before the Federalist Society, University of Virginia, March 5, 1988 at page 13.

<sup>6</sup>Letter to the President by 14 Members of Congress, July 17, 1989; United States Senate, Committee on the Judiciary, Nomination Hearing for Clarence Thomas to be a Judge on the United States Court of Appeals for the District of Columbia, February 6, 1990 at 90.

Former EEOC Chair Thomas was also responsible for the forfeiture of over \$450 million dollars in lost benefits to older workers because of the EEOC's refusal to enforce the ADEA. Despite his stated commitment to rescind EEOC interpretive guidelines which had improperly held that employers were not required to make pension contributions on behalf of workers over the age of 65, Mr. Thomas issued no rescission order.<sup>7</sup> It was only when Congress stepped in, after four long years, that an amendment to the ADEA was passed requiring such pension contributions. In fact, EEOC did not correct its regulations until it was ordered to do so by the United States Federal Court. As United States District Court Judge Harold Green stated in finding against EEOC, the agency "has at best been slothful, at worse deceptive to the public, in the discharge of its responsibilities."<sup>8</sup>

A critical issue that will be facing the Supreme Court in the future is to what extent, if at all, can employees be forced to waive their rights to protection under the federal equal employment statutes. NELA is extremely concerned that employees, in their need to preserve their job, will be coerced

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<sup>7</sup>AARP v. EEOC, 655 F. Supp. 228, (D.D.C., 1987) Aff'd in part, rev'd in part, on other grounds, 823 F.2nd 600 (D.C. Circuit 1987)

<sup>8</sup> Id at 229

into waiving their most valuable statutory and constitutional rights in order to work. Judge Thomas, as Chair of the EEOC, has indicated his lack of willingness to protect workers against such coercion. The EEOC, under Judge Thomas' leadership, promulgated regulations which allowed employees to obtain waivers of rights under ADEA from employees without the supervision of the EEOC. Again Congress had to step in and suspend those regulations starting in fiscal year 1988. Again in a continuing pattern of arrogance and hostility toward Congress, the EEOC refused to withdraw or modify the lax waiver guidelines. Judge Thomas' willingness to undermine the protection afforded by ADEA to all the workers cast grave doubt on his commitment to enforce these laws.

The EEOC, under Mr. Thomas' stewardship refused to follow or actually undermined clear mandates of the Supreme Court and thereby denied claimants' remedies to which they were entitled. In Griggs v. Duke Power.<sup>9</sup> The Supreme Court established the disparate impact test for proving discrimination. Under this theory a member of the protected group could establish a prima facie case of discrimination by demonstrating that an employment practice disproportionately affected members of the protected class. Proof of intent was

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<sup>9</sup> 401 U.S. 424 (1971)

not required. Mr. Thomas disagreed with that Supreme Court precedent and, therefore, not only failed to pursue litigation where appropriate, but sought to change EEOC regulations which were established pursuant to Griggs.<sup>10</sup>

Moreover, Judge Thomas has been less than candid with the Senate regarding his preconceived position on Griggs. Senator Spector extensively questioned the nominee on Griggs pointing out that Congress had let Griggs stand for 18 years, thus showing Congress' view that its intent was being carried out. Judge Thomas said that 18 years was a long time and it was a factor to take into account in determining congressional intent thus implying his agreement with Senator Spector. He failed to explain why, if he believed Griggs reflected congressional intent, he sought to undermine it through Executive regulations that were contrary to Congress' position.

Further, although the courts, including the Supreme Court, had established very clearly under Griggs and United States v. Teamsters<sup>11</sup> that statistical disparities could establish evidence of

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<sup>10</sup>"Changes Needed in Federal Rules on Discrimination," N.Y. Times, December 3, 1984 at A1, "EEOC Chairman Questions Job Bias Guidelines," Assoc. Press, December 3, 1984

<sup>11</sup> 431 U.S. 324 (1977)

discrimination, Judge Thomas criticized the use of statistics and in 1985 disbanded the EEOC Division responsible for bringing nationwide pattern and practice charges against major companies.<sup>12</sup>

Judge Thomas' hostility to affirmative action, particularly the use of goals and timetables in appropriate circumstances, is well documented and not denied.<sup>13</sup> As chair of the EEOC, he interjected his personal views on that subject and allowed those views to compromise the activities of the EEOC. The use of goals and timetables to remedy past discrimination was a well established legal remedy upheld by the United States Supreme Court on any number of occasions.<sup>14</sup> Nonetheless, as a consequence of his personal opinion, Judge Thomas did not exercise the EEOC's oversight authority to enforce public sector affirmative action requirements under Section 717 of Title VII. Judge

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<sup>12</sup> See BNA Daily Labor Reporter, February 19, 1985 Mixed Motives Attributed to EEOC's Disbanding of Systemic Programs Office, at page A-9

<sup>13</sup> Hearing Before the Committee on Labor and Human Resources of the United States Senate, 97 Cong. 2d Sess. 16 (March 31, 1982)

<sup>14</sup> United States Steel Workers v. Weber, 443 U.S. 193 (1979) Fullilove v. Klutanick, 448 U.S. 448 (1980), Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987)

Thomas persistently voiced his strong opposition with the Supreme Court's approach insisting that the use of goals and timetables "turns the law against employment discrimination on its head".<sup>15</sup>

Judge Thomas also thwarted the prosecution of class actions. Discrimination claims, by their very nature, are class claims "as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion, or national origin."<sup>16</sup> Class actions, are a major weapon in the arsenal of civil rights protection for minorities and women. Indeed, recognizing the class nature of discrimination claims, Congress empowered the EEOC to initiate "pattern and practice" claims of discrimination against employers<sup>17</sup>.

The benefit of class claims is that they allow the government or private litigants to attack basic practices and policies which directly or effectively preclude women, Blacks, Hispanics and other minorities from obtaining employment opportunities within e given

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<sup>15</sup> Thomas, "Affirmative Action Goals and Timetables," 5 Yale L. and Pol. R. 402 at 403, note N.3 (1987)

<sup>16</sup> Bowe v. Colgate Palmolive Company, 416 F. 2nd 711, 719 (7th Circuit 1969). See General Tel. Company v. Falcon, 457 U.S. 147 (1982).

<sup>17</sup> Initially the United States Department of Justice was given the litigation power which was transferred to the EEOC in the 1972 amendments.

company. The class action/pattern and practice case can economically and more quickly reach issues that no individual litigant could resolve. For example, in one of the more major cases upholding a pattern and practice class action brought by the United States government, the trucking industry, which completely excluded Blacks and other minorities from the higher paying truck driver positions was on mass opened up to those groups by the successful resolution in United States v. Teamsters. If that had been simply an individual case then, if that individual could have even afforded to bring on a lawsuit, he would, at best, been able to obtain one single position among thousands for himself. Each individual teamster would have to come forward and raise his own complaint which would mean that the industry could continue to be foreclosed to a sizeable number of Blacks for many years.

Another major example of the economy and effectiveness of the class action/pattern and practice suit is the recent \$66 million dollar settlement in the case of EEOC v. AT&T, 78 Civ 3951 U.S.D.C. for the Northern District of Illinois, Eastern Division. In that case, the company had discriminated against pregnant women by requiring them to take unpaid leaves at the end of their six months of pregnancy while

denying them full seniority credit while on pregnancy leave and denying them job guarantees after child birth. There were 13,000 identifiable victims of discrimination who were made whole by this settlement. There is no possibility that those 13,000 victims would have successfully pursued individual claims given the expense and time consumption of Federal litigation.

Although the class action pattern and practice suits have proven to be one of the major tools for successful elimination of discriminatory treatment, Judge Thomas has scorned its use. While EEOC filed a total of 218 class actions in fiscal year 1980, under Judge Thomas' chairmanship, only 129 such actions were filed in 1989.<sup>18</sup> Moreover, in 1985, while chair of the EEOC, Judge Thomas disbanded the EEOC division responsible for bringing national pattern and practice charges.<sup>19</sup>

Judge Thomas' reluctance to use the class action mechanism provided for in the statute or to rely on statistical evidence as approved by the United States Supreme Court deprived victims of discrimination the full panoply of government support committed by the

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<sup>18</sup> Women Employed Institute, EEOC Enforcement Statistics (1991)

<sup>19</sup> See Mixed Motives Attributed to EEOC's Disbanding of Systemic Programs Office, Daily Lab. Rep. (BNA) at A-9 February 19, 1985]

Congress of the United States. Congress specifically recognized the value of the class action/pattern and practice mechanism in adopting the law. The Supreme Court recognized these principles. Yet the person primarily responsible for enforcing the law allowed his personal opinions on these issues to thwart congressional intent. By limiting EEOC's class actions, he effectively denied thousands or possibly tens of thousands of victims of discrimination effective relief under the statute.

Judge Thomas' stated rationale for his opposition to the use of class action lawsuits and to the use of remedial goals and timetables is that the law protects rights of individuals, not groups. It was his announced position that acts of discrimination must be individually proven and dealt with.

However, under his administration, individual victims were unable to receive any remedial relief as were class members. Indeed, the lack of effective investigative and litigation techniques at the EEOC under Clarence Thomas required special investigation on three separate occasions by the Government Accounting Office.<sup>20</sup> The GAO severely criticized the

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<sup>20</sup> Information on the Atlanta and Seattle EEOC District Office (GAO/HRD-86-63FS, Feb. 1986); EEOC Birmingham Office Closed Discrimination Claims Without Full Investigations (GAO/HRD-87-81, July 1987; Equal Employment Opportunity EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11).

EEOC's case handling and investigative methods. In its 1988 report on the EEOC, the GAO further found that during the five year period, fiscal years 1983-1987, the rate of EEOC cause determinations ranged from a mere 2.6 percent to a mere 3.9 percent<sup>21</sup>. Thus, as the GAO found, at no time from 1983 to 1987 did the EEOC find merit or cause to more than 4% of its charge filings. Such results from an agency with an approximate budget of 180 million dollars are mediocre indeed.

The EEOC's litigation statistics are equally dismal. Although the Agency had 50,110 new employment discrimination charges filed in 1986, the total number of cases that the EEOC actually filed in Court in 1986 was a mere 526 cases.<sup>22</sup> Thus, in only slightly more than 1% of its charges, did the EEOC engage in any litigation whatsoever on behalf of employment discrimination victims.

Statistics for the year 1986 are not an anomaly but merely one example of the astonishingly ineffective role of the EEOC under Chairman Thomas in the enforcement of its mandate. One need only contrast the record of the EEOC under Clarence Thomas

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<sup>21</sup> Equal Employment Opportunity EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11).

<sup>22</sup> Employee Rights Litigation: Pleading and Practice, Goodman, J. Editor, (Matthew Bender, 1981) § 13.18 p. 13-60 fn 4

with the record of the National Labor Relations Board (NLRB), a sister federal labor relations agency which had a similar workload and a similar task to place such failure in context. The NLRB received 41,639 cases in FY 1986.<sup>23</sup> In contrast to a reasonable cause finding of less than 4% at the EEOC, the NLRB had a reasonable cause finding of 33.7 percent of charges filed in that same year.

Moreover, the settlement rates plunged at the EEOC under Clarence Thomas. In fiscal year 1980, prior to Chairman Thomas, 32.1% of the cases were settled whereas in fiscal year 1989 under the helm of Chairman Thomas only 13.9% of the cases were settled. This astonishingly low settlement rate at the EEOC is to be contrasted with the settlement rates at the NLRB for the years 1985 through 1989 which ranged from 91.1 percent to 94.4 percent.<sup>24</sup> Clearly, these mediocre EEOC statistics reflect a record of non-performance. They further reflect the experience of NEELA's member attorneys who hear the legitimate complaints of EEOC

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<sup>23</sup> EEOC Office of Program Operations, Annual Report, FY 1986, Appendix 3, EEOC Receipts by Status for Title VII, for FY 1982 through FY 1986.

<sup>24</sup> Office of the General Counsel (NLRB), Summary of Operations Reports (For Respective Fiscal Years 1985, 1986, 1987, 1988 and 1989).

Charging Parties. The EEOC, under Chairman Thomas, simply did not meet its mandate in serving the Charging Parties who have sought its assistance in ending employment discrimination.

Judge Thomas' tenure at the EEOC was thus marked by hostility to the Agency's mandate, as then defined by the Supreme Court. While he was undoubtedly free to hold his own opinions about the EEOC's enabling statute and Supreme Court caselaw, his acceptance of a position in which he was charged with the enforcement of a statute with which he did not agree, and his refusal to enforce the law as authoritatively construed, raises troublesome questions about his commitment to the legal and judicial process.

#### CONCLUSION

Over 75% of the workforce is not represented by unions and has no protection other than that afforded by statute as interpreted by the courts. Congress has expanded the protection of those workers to assure that equal employment opportunities are established for all Americans. It is the Supreme Court's duty to safeguard those rights as established by Congress. Judge Thomas' record as the chief legal enforcer of the rights established by Congress, as interpreted by the court, raises grave doubt about his commitment to equal employment opportunity. He has withdrawn

support from those workers most vulnerable to the coercion of arbitrary and unfair employers. His record indicates a readiness to overturn established protections and that he would impose his own personal philosophy in disregard of long established legal principles. We, therefore, urge that the Senate this nomination.

The CHAIRMAN. Thank you.  
Reverend Taylor.

#### STATEMENT OF REV. BERNARD TAYLOR

Reverend TAYLOR. My name is Rev. Bernard Taylor and I am chairman of the Black Expo of Chicago, an Illinois-based corporation involved in a host of activities to support the development of black business enterprises, including an annual exhibit that brings together black-owned businesses of all types to display their products to black consumers.

The most recent of these was held this past July in which over 400 businesses exhibited to hundreds of thousands of consumers.

I am also an ordained minister in the African Methodist Episcopal Church, the oldest black church denomination in America, a church that was organized because of discrimination. I also serve as assistant pastor, Grant Memorial AME Church in Chicago.

I am a graduate of Roosevelt University with a BA degree in sociology and the Chicago Theological Seminary with an MA in theology. Senators, I am here in opposition to the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

Clarence Thomas' personal history is not unique. Most African-Americans who have grown up in this country have experienced poverty, disrespect and hostility by whites who have called our women, girls; our men, boys; and niggers and worse. African-Americans have been victimized by vicious expressions of racism. We can identify with and are still pained by the descriptions of Judge Thomas on last week.

The notion of self-help and self-reliance are not concepts that are foreign to African-Americans. Booker T. Washington, the founder of Tuskegee Institute wrote extensively on the need of self-help, which others have called passive resistance.

On the contrary, W.E.B. DuBois, professor at Atlanta University wrote for the need for progression through via the talented tenth paving the way for the rest of the race. We contend that a blend of these views must carry the day. While we need self-help we also need access to the avenues that will prepare our talented tenth and others to provide guidance to our people.

It is undisputed that self-help alone will not propel disadvantaged people into the mainstream of American society. No person who presently enjoys the position of power or authority has attained that position without assistance—be it governmental or otherwise. And that type of assistance has been and remains necessary if persons are to succeed in our society.

Judge Clarence Thomas, a man who has received some theological training, should be able to demonstrate human compassion, yet, we see him condemning those who would take advantage of well-earned benefits of Government. African-Americans are, and have been long-standing and faithful taxpayers and deserve to participate in every existing governmental benefit.

Affirmative action is an attempt to bring numbers of unrepresented groups into the mainstream of American life who have traditionally suffered discrimination and racism as a group.

Three of our past presidents recognized that African-Americans were severely discriminated against and signed executive orders to ease this situation. President Roosevelt's Executive Order 8802 ordered defense contractors to practice nondiscrimination in the awarding of contracts. President Kennedy's Executive Order 10925 provides contract termination as a penalty for noncompliance with equal employment practices. And President Johnson issued Executive Order 11246 which established the Office of Federal Contract Compliance within the Department of Labor.

These Executive orders were issued because of discrimination in employment and the awarding of contracts. But Judge Thomas has stated that he believes that affirmative action creates dependency. And he has made several references to that kind of affirmative action, alluding to quotas.

As Chairman of the EEOC, Thomas should have recognized quotas have never been part of the statutory affirmative action. Affirmative action with its timetables and goals has offered security for the status quo and potential benefit for others through attrition. The benefits of affirmative action are not hand-outs, but well-deserved rewards for the labors of ourselves and our forbearers.

In 1989, the *Richmond* decision and other Court rulings damaged affirmative action. When the courts ruled that race-based affirmative action was unconstitutional, the courts seemed to favor individual rights over group rights in the area of adjudication of discrimination claims.

African-American people need someone on the Court who is sensitive to the fact that they have been discriminated against as a group, and not just individually. By being in opposition to providing full affirmative action rights to African-Americans and others, Judge Thomas is contributing to the decline of affirmative action. He espouses self-help instead of affirmative action.

When a people are being denied, self-help at best is inadequate to affirmative action. Judge Thomas claims no agenda. But I would like to tell him that his agenda should be included in being a champion for those who have been systematically discriminated against. We need someone on the Supreme Courts who understands that African-Americans have been discriminated as a group. We need a voice on the Court who will be a champion for those who have been locked out of our society. Someone who is fully aware that his agenda should be inclusion of all citizens of these United States.

We say no to Clarence Thomas.

The CHAIRMAN. Thank you very much, Reverend.

[The prepared statement of Rev. Bernard Taylor follows:]

**BLACK EXPO Chicago**

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My name is Rev. Bernard Taylor, and I am Chairman of Black Expo Chicago, an Illinois-based corporation involved in a host of activities to support the development of black business enterprises including an annual exposition that brings together black-owned businesses of all types to display their products to black consumers. The most recent of these was held this past July in which over 400 businesses exhibited to hundreds of thousands of consumers.

I am also an ordained minister in the African Methodist Episcopal church, the oldest Black church denomination in America, a church that was organized because of discrimination; and serve as associate pastor at Grant Memorial AME church.

I am a graduate of Roosevelt University with a B.A. degree in sociology and Psychology and Chicago Theological Seminary with a M.A. in Theology.

Senators, I am here in opposition to the nomination of Judge Clarence Thomas to the United States Supreme Court.

#### PERSONAL HISTORY

I. Clarence Thomas' personal history is NOT REMARKABLE

Most African-Americans who have grown up in this country have experienced poverty, whites who have disrespected our elders, family members who have been and remain in in what is now known as the "underclass", and been personally affronted with the most virulent and vicious expressions of racism. We can identify with, and are still pained by the descriptions punctuated by Thomas'

muffled sobs during the Confirmation Hearings. Most African-Americans have been or have known parents or grandparents or other relatives who have been disrespectfully addressed and treated. e.g (called boy, girl, nigger, or worse). Thomas' Pin Point Georgia experience is very familiar to most African-Americans, one we can readily identify with.

The notions of self-help and self-reliance are not concepts that are foreign to African-Americans. In fact, Booker T.

Washington, the founder of Tuskegee Institute,, wrote extensively on the need for passive resistance and self-help.

On the contrary, W.E.B. DuBois wrote of the need for progression via the talented tenth paving the way for the rest of the race.

We contend that a blend of those views must carry the day. While we need self-help, we also need access to the avenues that will prepare our "talented tenth" to provide guidance to our people. It is undisputed that self-help alone will not propel disadvantaged persons into the mainstream of American society. No person who presently enjoys a position of power or authority has attained that position without assistance, be it governmental or otherwise. That type of assistance has been and remains necessary if persons are to succeed in this society.

Judge Clarence Thomas, who has been a beneficiary of seminary training should be able to demonstrate human compassion. Yet, we see him denigrating those who would take advantage of the well-earned largesse of government.

African-Americans are and have been long-standing and faithful taxpayers, and deserve to participate in every existing governmental benefit. The benefits of Affirmative Action are not handouts, but, rather the well-deserved

fruits of the labors of ourselves and our predecessors, borne of scores of years of efforts toward achievement.

Those commentators who marvel at how Thomas overcame such obstacles should recognize that his experiences are neither unique nor unusual. Many of us can identify with the challenging, humiliating treatment and difficult circumstances faced by persons who are minority and, as a result, disadvantaged.

#### INCONSISTENCIES

II. Thomas' inconsistencies abound. Clarence Thomas claims to have "NO AGENDA" in seeking the role of Justice of the United States Supreme Court. He further and frequently asserts the difference in the role of Justice and his former role as spokesperson for the Administration as a reason why his earlier statements, speeches and writings should be disregarded or given a limited amount of credence. In fact, he frankly disavows many of the statements he previously made.

Yet, Judge Thomas has not, in his years of public service conducted himself as one who can think clearly for himself. His record demonstrates that he will not only carry out the intentions of, but will actually parrot the views of those to whom he appears to be beholden. Few can forget Ronald

Reagan's repeated references to totalitarianism. Predictably, Thomas' speech to various groups reflected Reagan's baseless verbiage, offering none of the substance which would be expected of a legal scholar.

III. Judge Thomas has made several references to "that type of Affirmative Action", alluding to quotas. He has further stated that he was never a beneficiary of "that type of Affirmative Action". As Chairman of EEOC, Thomas should have recognized that quotas have never been a part of statutory Affirmative Action. Affirmative Action, with its attendant goals and timetables, provided both a security interest for present beneficiaries of the status quo, and an expectancy interest for potential future beneficiaries of Affirmative Action. The expectancy interest provided by goals and timetables simply represents Affirmative Action (or limited replacement) by attrition. Such a scheme is gradual and, based on current projections, represents a recognition of the future composition of the relevant work force.

Thomas represents that he favors individual rights over group rights in the area of adjudication of discrimination claims. He says this in 1991 when he is, and most informed members of the public are aware that the Court, in 1989, severely curtailed the rights of both groups and individuals in adjudication of cases related to discrimination.

The Clarence Thomas who has presented himself to the public for the past ten years should not be appointed to the United States Supreme Court.

The CHAIRMAN. Let me begin the questioning with you, Ms. Aiyetoro, if I may. How do you account for the fact that Judge Thomas in most of his writings and speeches fails to directly confront and say forthrightly what you think he believes, which is that he is opposed to choice, he—was supportive, or at least insensitive to the situation in South Africa, and so on? How do you account for that?

Ms. AIYETORO. I don't, Senator Biden. I am not sure why he doesn't say more specifically than he does in his speeches his position on the issue of choice for women and the issue of South Africa. I would assume that you would have to ask him about—

The CHAIRMAN. I did.

Ms. AIYETORO. I know. I guess one answer that I would have, which is an answer that someone gave you on an earlier panel, is that most of the times when he was making his speeches, the speeches that I am familiar with, he was speaking on a particular topic, and so many of these things were not specifically related to it.

I guess the other answer I would give you is that despite whether or not he has specifically said his position on South Africa or choice or other issues that I was always raised by the adage that by your deeds you will be known. And I think we have to look at not just the words and speeches but his conduct.

I believe that his conduct and things that he has adopted, in speeches as well as being on the advisory board of the Lincoln Review, those kinds of things indicate something about him that I think that we have to, you know, as lawyers, as human beings, we draw implications that are rebuttal presumptions, I would assume.

The CHAIRMAN. Thank you.

Ms. McPAHIL, are you at liberty to tell us not how who voted, but since your organization has such wide respect and it was such a close vote—it reminds me of that old joke, you know. The board of directors voted 5 to 4 to send you a get well card. You know, that kind of thing. I mean it was awfully close.

Was there any single defining issue that split the vote? I mean did it break down in any specific way? Were people saying, well, we will give him a chance, we will give him the benefit of the doubt, or we disagree with him because he believed one thing on affirmative action and another on something else? Do you understand what I am trying to get at? What did you all debate?

Ms. MCPAHIL. Well, we debated primarily his views on affirmative action and his record at the EEOC. The vote, and I am at liberty to tell you—it is public knowledge, we announced it afterwards. So you have a full picture of it, our Judicial Selection Committee came in with a 6-to-5 vote against him. Our board voted 23 to 21 to reject the Judicial Selection Committee, which is essentially a vote for him. Our delegates on the floor then voted 124 to support him, 128 to oppose him, and 31 to take no position whatsoever.

The CHAIRMAN. My goodness.

Ms. MCPAHIL. So there were four votes that opposed those between—you know, those who wanted to support him outright and those who wanted to oppose him outright.

The CHAIRMAN. Ms. Seymore, one of the startling figures—at least I find it startling—is that there are fewer police officers or

black, women and men alike, today than there were 10 years ago. More than 20 years ago, but fewer than 10 years ago.

Can you shed any light on why you think that is the case?

Ms. SEYMORE. Well, in larger departments, say, for instance, Washington, DC, 10 years ago the minority participation here was 36 percent. It is now up to 86 percent. But there are hundreds of departments throughout the country that do not have those numbers. Say, for instance, a department who had 800 minorities 10 years ago are down to 400 minorities. Or a department who had 12 females 10 years ago who today have none.

So because of the disparity in the sizes of police departments, that is why the numbers show lower today than 10 years ago.

The CHAIRMAN. Ms. Aiyetoro, we heard testimony—you testified very eloquently to your view of Judge Thomas', at a minimum, insensitivity, at a maximum, as I understood your testimony, support of the South African Government. It is somewhere in between I guess you view it.

We heard testimony from two members of the board of Holy Cross University, one a former Federal judge of some reputation and repute out of the third circuit, and the other the president of the university, saying that Judge Thomas argued—I forget the adjective they used—but vociferously, or argued strenuously for disinvestment.

I think—let me ask my staff to make sure I am correct on this. Well before his nomination to the court, either court, I believe—the court he now sits on or the Supreme Court.

How do you square that with what was obviously the facts as you cite them, and they were the facts—how do you square the two things?

Ms. AIYETORO. Senator Biden, it is my understanding from the review of the materials about Judge Thomas that there was a period in his life in which he was more of an activist for the rights of people of color, as well as human rights or civil rights in general. That was a period of time, it is my understanding from the record, when he was at Holy Cross, and he was instrumental in forming the Black Student Union.

I think that what we see in his history is what we see in many of us, perhaps, or are familiar with someone like Judge Thomas who when he is in college for whatever reasons they get involved in the history of the moment. We have to realize that Judge Thomas, much like I—I am 3 years his senior, but much like I—

The CHAIRMAN. Three years his senior?

Ms. AIYETORO. Yes, I am.

The CHAIRMAN. I don't believe it.

Ms. AIYETORO. We came up in a time in college years where the civil rights movement was out there. The civil rights movement was on the front pages, and many of us got involved that never had been involved before.

The CHAIRMAN. I may have misled you a little bit. The testimony, the explicit testimony was not while he was a student, but several years ago. I think 3 or 4 years ago, when he was a member of the board of directors.

Maybe my friend from Illinois can shed some light on that.

Senator SIMON. Yes. This was just within, I think it was 2 or 3 years ago. And if I can just complicate the question even more, if my colleague will let me.

The CHAIRMAN. Surely.

Senator SIMON. At Holy Cross he said we should disinvest, but here in Washington he was opposing sanctions.

The CHAIRMAN. Well, that was my point.

Ms. AIYETORO. OK.

The CHAIRMAN. Ms. Aiyetoro indicated that.

Senator SIMON. Yes.

The CHAIRMAN. She recited the fact that in Washington here and both with regard to his actions, his comments and his references to people to whom he looked for guidance represented a view that was at least benign about apartheid.

And what I am trying to get at is at the same time he was, and I have no reason to doubt Judge Gibbons, a man of incredible honor, nor the president of the university, he was at board meetings, using their characterization, strenuously arguing that his alma mater should disinvest from—I am paraphrasing, but I think he talked about an immoral and abominable practice.

So I wonder if you factor that in. I am just trying to understand how you view it. I am having trouble figuring it out. I am wondering what your view is.

Ms. AIYETORO. Well, I have trouble figuring it out. I mean the only thing that I can say to you, Senator Biden, is that this I think, on the one hand, could either clarify or further complicate your deliberation. It seems to me if you have someone that is, as we would call it, saying two things, speaking out of both sides of his or her mouth, then I think that we have a serious problem.

From what we know in terms of the public view, I knew more about what he did in Washington, and I am concerned that a person—if indeed he even had the views, that even causes me to have more concern. Because at least I feel like if I am dealing with a person who is straight along the line has a position in support of the apartheid government I may disagree, and I do strongly disagree, just to make it clear, but I would at least say that this person is consistent.

To have someone who today is telling us that he is not—he is in support of the apartheid government, but yesterday is lobbying against that government, I would have serious pause for concern about that person.

The CHAIRMAN. I thank you. My time is up. I yield to my colleague from South Carolina.

Senator THURMOND. Mr. Chairman, I just want to take this opportunity to welcome you all here. It is nice of you to come and show your interest in this hearing. You have expressed yourself. And there have been others who have taken different views and some who have taken your view, but we are glad to have you here.

Mr. Chairman, I would ask unanimous consent that a letter addressed to you, dated September 17, 1991, from Thomas Adams Duckenfield, a lawyer here in Washington, be placed in the record.

The CHAIRMAN. Without objection.

Senator THURMOND. If it has not been placed. You haven't placed it in, have you?

The CHAIRMAN. I have not. I don't think I have.

Senator THURMOND. I will just read the first paragraph:

DEAR SENATOR BIDEN. As a former president of the National Bar Association, I share with you my wholehearted support for the confirmation of Judge Clarence Thomas as an Associate Justice of the Supreme Court of the United States.

I won't bother to read the rest of it. I will just put it in the record.

The CHAIRMAN. Without objection.

[The letter follows:]

THOMAS ADAMS DUCKENFIELD, ESQUIRE  
 7215 SIXTEENTH STREET, N.W.  
 WASHINGTON, D.C. 20012  
 TELEPHONE (202) 829-9305

September 17, 1991

The Honorable Joseph Biden  
 Chairman  
 Senate Judiciary Committee  
 Office of the United States Senate  
 Room 224  
 Dirksen Office Building  
 Washington, DC

RE: Confirmation of Judge Clarence  
 Thomas as an Associate Justice of  
 the U.S. Supreme Court

Dear Senator Biden:

As a former President of the National Bar Association, I share with you my wholehearted support for the confirmation of Judge Clarence Thomas as an Associate Justice of the Supreme Court of the United States.

Your committee, over the last week, has conducted its confirmation hearings for Judge Thomas' appointment to the Supreme Court. The world has been poised for the drama that has been unfolding. The hearings have been a real education in the modern politics of judicial appointments. For certain they have been an unforgettable lesson on the constitution and jurisprudence. We are indeed hopeful that if there are no disqualifying factors in existence and that his legal credentials remain as impeccable as they are, the committee will recommend Judge Clarence Thomas to the full Senate for confirmation. So far, I have not seen anything that would disqualify Judge Thomas. This is a view that is shared by many, many Americans. He is well qualified to assume the awesome responsibility of a Justice on the Supreme Court of the United States.

We are not unmindful of many subsisting questions that loom on the horizon raised by various and sundry individuals and groups as to why the nominee should not be confirmed. Fortunately, we have heard them all and find them devoid of any substance. We admit that the individuals and groups themselves are substantive, but the questions posed by them are not. At best they all articulate subconscious fears of the unknown based on their dislike for the sponsors of our nominee and/or their intellectual inertia to a new agenda for Civil Rights. As was spoken in the gospels: "Can there be any good thing out of Nazareth?... Come and see."

Unfounded fears abound in the minds and hearts of many highly intelligent people. All manner of paranoid imaginations are conjured up. None of those fears is justified in fact. Nothing suggests that Judge Thomas, if allowed to become Justice Thomas, would not take a legal and scholarly approach to any matter up for decision based on the facts and law as applied to that particular case in the context of the constitution. He will bring a commitment to fairness, openness and justice to the deliberations before the U.S. Supreme Court.

Under the Constitution of the United States, the Advice and Consent of the Senate are a must before this nominee or any nominee is confirmed to assume the public office to which he or she has been appointed. We are well aware that the Senate sacredly guards the authority and

scrutinizes nominees with the utmost care. During the course of the hearings, you have, I believe, sought to carry out your constitutional mandate in a responsible and fair manner.

The great furor over Judge Clarence Thomas's nomination to the Supreme Court of the United States centers around the fact that the "civil rights" issues are no longer in the forefront of American politics. This fact or turn of events did not come into being because of Clarence Thomas, one way or the other. In Harold Cruse's book, "Plural But Equal," page 385, he expresses the matter thusly:

"Civil rights justice for all intents and purposes of the United States Constitution have been won; there are no more frontiers to conquer; no horizons in view that are not mirages that vanish over the hill of the next court decision on the meaning of equal protection."

This fact creates an exasperating situation for the agenda in the traditional Black Establishment. In the whole of the "Eighties," they have literally been trying to "reinvent the wheel" so far as Civil Rights justice is concerned. And yet, there are other durable and legitimate options and approaches for the cause of justice and equality. For them, there is no other course of action to follow. Frederick Douglas called it "delirium of enthusiasm with the inability to distinguish between the "see and real." As Douglas further said: "The pen is often mightier than the sword and the settled habits of a nation mightier than a statute."

Senator Biden, as Chairman of the Judiciary Committee, and to your fellow committee members, the most noble thing you could do to bring "Black Americans" into the mainstream of American life, is to recommend Judge Clarence Thomas for confirmation to the Supreme Court. Such is beneficial for all Americans, particularly minorities. Unfortunately, a substantial measure of astute individuals have demonstrated a confused and misdirected consciousness which remains detached from the body politic in America. Do for us and them what these individuals are incapable of doing for themselves, for your decision will wed to generations to come a proper relationship for those whose ancestry bore the burden of labor in the foundation of this democracy.

Very truly yours,

*Thomas A. Suckinfield*

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<sup>1</sup>William Murrow, New York, 1987.

Senator THURMOND. He held the same position, I believe, Ms. McPAHIL, as you hold now; is that correct?

Ms. McPAHIL. No, Senator, it is not correct.

Senator THURMOND. He was president. You are president now.

Ms. McPAHIL. Yes. With all due respect—oh, you mean he had the same—yes, he held—

The CHAIRMAN. At one time he did.

Ms. McPAHIL. He was in the position.

Senator THURMOND. Yes, of the National Bar Association.

Ms. McPAHIL. But let me make clear for the record that only one person may speak for the National Bar Association and that is its current president.

Senator THURMOND. You are the president now of the National Bar Association, aren't you?

Ms. McPAHIL. Yes, sir.

Senator THURMOND. Well, he was the president evidently several years ago.

Ms. McPAHIL. Several years ago.

Senator THURMOND. So I just want to place that in showing there is a division in your association as to how you stand on this matter.

Ms. McPAHIL. Yes, sir. Mr. Duckenfield is certainly free to express his opinion as a private citizen, but not as a representative of the National Bar Association.

The CHAIRMAN. I don't believe he purports to speak for the National Bar.

Ms. McPAHIL. Thank you.

Senator THURMOND. The hour is late, and I have no questions. Thank you very much.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

If I could get real fast answers from each of you on this: Ms. McPAHIL has told about the National Bar Association and the division there, if I may ask each of you—Reverend Taylor, I don't know if you are speaking for your organization or not.

Reverend TAYLOR. Yes.

Senator SIMON. Was this a close vote, an easy vote, marginal in the authorization for you, Ms. Aiyetoro?

Ms. AIYETORO. Senator Simon, I have to answer it this way: It was a very difficult vote, because we had to deliberate and some of the questions I raised were questions to you all, we had to raise for ourselves, the importance of him being a black man, but our board voted unanimously to oppose.

Senator SIMON. OK. Mr. Hou.

Mr. HOU. Senator Simon, I think for the NAPABA's position, what had happened is that each of the local Asian bar associations that comprise NAPABA engaged in extensive debate and discussion at the local level, from there moved up to a regional level, and then ultimately up to the national board level, where the final vote was taken.

During the process, I think, as an organization, we did a very thorough review of all of Judge Thomas' decisions, his record at EEOC, at DOE, and through that process we also talked to various people who knew Judge Thomas in various capacities, and as a

result of that entire process, we ended up voting to oppose. I think it was a pretty thorough discussion, but the actual vote I don't believe was that very close.

Senator SIMON. OK. If I can ask the rest of you to be a little more brief, because I am trying to get a couple more questions in here.

Ms. Seymore.

Ms. SEYMORE. The annual conference of the National Black Police Association, our general assembly instructed the national board of directors to make a decision on the Clarence Thomas nomination, and it was a close vote.

Senator SIMON. Mr. Schulder.

Mr. SCHULDER. No, it was not a close vote. Our organization opposed his nomination to the court of appeals and it was easy to oppose this nomination.

Senator SIMON. Ms. Axford.

Ms. AXFORD. Ours was not a close vote, either. There were only several people who were not willing to oppose, and the central issues had to do with the future issues that were coming up, particularly waiver of constitutional and statutory rights, and our major concerns about his opposition to class actions.

Senator SIMON. Reverend Taylor.

Reverend TAYLOR. The majority of our organization voted against Clarence Thomas.

Senator SIMON. Was it a close vote?

Reverend TAYLOR. No, no.

Senator SIMON. OK. Mr. Hou. We have had how many witnesses, Mr. Chairman, or will have?

The CHAIRMAN. We are getting close to 90 when we finish—I am sorry, through today we will have had about 60 witnesses so far.

Senator SIMON. Sixty witnesses, and to my knowledge, you are the only Asian-American who will be testifying; is that correct?

The CHAIRMAN. I think that is true. I don't know that.

Senator SIMON. Are there any other Asian-American organizations that have taken a stand in this, do you know?

Mr. Hou. I am aware that the Organization of Chinese-Americans, which is a national organization, has taken a stand to oppose the nomination. I am also aware that Chinese for Affirmative Action, which has a long history as a civil rights organization, voted to oppose him.

Senator SIMON. Mr. Schulder, on page 9 of your testimony, you have something here that I don't believe I have read before, and it gets to the whole question of whether Judge Thomas sides on the side of privilege or with people who have great need. It talks about a closed session, where he is speaking. What is your source for this closed session?

Mr. SCHULDER. The transcript of closed sessions are made available to the public, they are public documents and that is the source of this, and what it does show is that Judge Thomas, indeed, was speaking from the vantage point of employers, rather than the workers in the Xerox case.

Senator SIMON. I thank you.

In connection with your testimony, I notice you have attached a very strong statement from the AARP, too, that ought to be entered in the record, if it has not been.

The CHAIRMAN. Without objection.

Senator SIMON. I thank you all, particularly Reverend Taylor, and we thank you all for sitting so long before you get a chance to testify.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Thank you for your understanding of our agenda today and the time we take, regardless of what members of the panel may think. We have taken a great deal of time with this issue, because of the sensitivity of the chairman and the ranking member, and that is the way we do our business. I think that is quite evident.

You know, I was interested in the National Bar Association and the closeness of the vote. Was that a public vote? I mean did people stand and put their hand up, or was it a closed ballot?

Ms. MCPAHIL. Well, the session was closed, but it was by ballot.

Senator SIMPSON. Secret ballot.

Ms. MCPAHIL. People did stand and speak for and against, so you knew pretty much who was for him and against him, but it was a secret ballot and the session was closed to the press.

Senator SIMPSON. If it was not a secret ballot, I only ask you if this is the case, how did you vote?

Ms. MCPAHIL. How did I vote?

Senator SIMPSON. Yes.

Ms. MCPAHIL. Well, Senator, I considered that I might be asked that question and it troubled me, because I am here as the president of the National Bar Association and, as its president, I must represent its vote. Were I to respond to that question, then I suppose, if pressed, I might, there would be at least half of the members of my organization who would be very disturbed about that, so I would appreciate not being asked to respond to it, but I would, if you insist.

Senator SIMPSON. I understand that fully. We will end that, but we won't quit here now.

I wanted to ask Ms. Aiyetoro: You say some pretty tough things, pretty harsh about Judge Thomas. For example, "President Bush's nomination of Judge Thomas to fill the seat vacated by Justice Marshall is an insult, not only to people of color and women, but to the legacy of Justice Marshall." That is pretty tough stuff, in my mind. You make it all sound that all people of color and women find Judge Thomas' nomination an insult. It is difficult for me to see how you purport to speak for 58 percent of the black Americans that, in a September 16, 1991, ABC opinion poll found supporting Judge Thomas and his elevation to the Supreme Court.

Your testimony also refers to the *Griggs v. Duke Power*. That case held that plaintiffs may prevail in a title VII discrimination suit, if they show that an employer's facially neutral employment practices were causing significant statistical disparity in their workplaces. You note the certain EEOC guidelines that attempt to inform employers about how this case applies to them, and then you say, "Judge Thomas, as the EEOC Chair, attacked the guidelines, because, in his view, they encourage too much reliance on

statistical disparities as evidence of employment discrimination," and then you claim, "Thomas attempted to make proof of discrimination insurmountably difficult, with total disregard for current law."

I respectfully say that I think that you have misread current law. Current law does not allow a disparate impact suit to be based on statistics alone. It requires that plaintiffs demonstrate how certain employment practices cause the statistical disparity.

In fact, even in our colleague's civil rights bill of last year, Senator Kennedy, about which I have very strong concerns, he stated the following: "The mere existence of a statistical imbalance in an employer's work force, on account of race, color, religion, sex or national origin is not alone sufficient to establish a prima facie case of disparate impact violation."

Are you then telling us that Judge Thomas is wrong, that statistics alone are sufficient to establish that type of impact violation? Is that what you are saying?

Mr. AIYETORO. No, Senator Simpson, that is not what we are saying. I would like to respond, if I can, to several of the statements that you made. First of all, we don't purport to speak for all black Americans. Our statement that the nomination of Judge Thomas is an insult to the people of color, as well as to the legacy of Thurgood Marshall, is that our assessment of what has happened to black Americans and African-Americans in this country is one that there is a need for someone who at least understands and supports remedies that will go to actually eradicating racism and the results of racism in the society.

It is our view, based on our review of the materials and Judge Thomas' position on a number of things that Judge Thomas, even though he has the background of being a black man raised in a situation of not as many resources as many others, is a person that has turned his back on the very remedies that our organization feels are essential, and it is not simply our organization, but any number of organizations who speak not simply for African-Americans, but people of color and women, so that we would not purport to do so.

As to the polls that you spoke about, one of the things that we have found, as we have talked to people about Judge Thomas' nomination, is that many people who were polled are really people who don't know about his record. I realize that, for many persons, it is hard to understand that, in fact, when a black man is appointed, even though, as Senator Biden said earlier, there was as certain number of people who reserved their position, that for many people, when they have not heard the full record, will support.

We have found, when we speak to people and talk to them about the record, they indeed either question whether we should support Judge Thomas or, in fact, go the other way. The margins are not that great.

The last thing, in terms of the issue of statistics, I am also a litigator and I do civil rights and constitutional law. What we are not saying is that Judge Thomas said that you can't totally rely on statistics, but Judge Thomas did not even want to utilize statistics at all in title VII cases. It is, of course, part of title VII proof, part of the statute itself is the statistical evidence is very much a part of

the case. That is not 14th amendment law, in many ways, but for title VII it is.

When we criticize *Griggs*, at the time Thomas criticized *Griggs*, that was the law, so he indeed criticized and did not support the law as it existed at the time and that is the point we were making in our testimony.

Senator SIMPSON. Mr. Chairman, I just had one other question, if I might ask it.

The CHAIRMAN. Go ahead.

Senator SIMPSON. I would ask Ms. Axford, your organization criticized Judge Thomas for having only 17 months experience on the U.S. Court of Appeals for the District of Columbia. Have you, or have you, Ms. Aiyetoro, have you read his decisions while on the circuit court that he serves on?

Ms. AIYETORO. Yes, I have read some of them. I am not sure if I have read every single one of them. I have read a summary of every one. I have read some of them page to page.

Senator SIMPSON. Have you read the criminal decisions that he has given?

Ms. AIYETORO. I have read some of them. I have read summaries of all of them.

Senator SIMPSON. Are you aware that in the criminal decisions, and other on the panel have spoken to those, that there is not a single dissent in those criminal decisions, and Judge Ginsburg, Judge Pat Wald, and Judge Abner Mikva all unanimously supported Judge Thomas' opinions in that arena? Are you aware of that?

Ms. AIYETORO. That is not my understanding. In some of the—

Senator SIMPSON. It is the truth. It is not just an understanding. On the criminal cases, that is the way it is, so I think it is important—

Ms. AXFORD. Senator Simpson, before you—

Senator SIMPSON. Yes?

Ms. AXFORD. I have read the decisions and I am curious about what the relevance of that is to his performance and the questions before you today.

Senator SIMPSON. Well, I do not have time to ask those questions. I believe it was Mr. Schuder who said something about the criminal—one of you in your testimony spoke of the criminal cases and how they were not appropriate or they were not sensitive enough, and so and so. I am saying it must be so, that Judge Ginsburg and Judge Wald and Judge Mikva are not sensitive, either, because they supported totally his position. That I guess is what I am saying.

Ms. AXFORD. I don't know where you are getting the characterization.

Senator SIMPSON. You don't have to worry. Let me ask you a question. Then you can have rebuttal, if you wish. I will stick around all night.

You criticize Judge Thomas for a lack of experience, and yet he has had 17 months of experience on the U.S. Circuit Court of Appeals for the District of Columbia. I believe that is your statement.

Ms. AXFORD. Well, that is not totally correct. Not lack of experience, but inadequate experience, considering the position for which he is being considered.

Senator SIMPSON. OK. And can you tell me how much experience Earl Warren spent on the bench before being appointed Chief Justice?

Ms. AXFORD. No.

Senator SIMPSON. None. How much time did Justice William O. Douglas spend on the bench before being appointed to the Supreme Court?

Ms. AXFORD. I don't know.

Senator SIMPSON. None. How much time did the great liberal Justice Hugo Black spend on the bench before attaining the Supreme Court?

Ms. AXFORD. I don't know.

Senator SIMPSON. None. How about Felix Frankfurter? None. Justice Louis Brandeis, none, who first wrote about privacy rights, that I believe in just as strongly as I think Judge Thomas does.

I really find it hard to believe that your organization would have opposed those remarkable people. I really take it then, and I have the sense, especially hearing your testimony personally, that your opposition based on this issue of judicial experience is directed only at conservatives, and when it comes to liberals prior experience really is quite irrelevant. That is a—if that is true. Is that true?

Ms. AXFORD. No. In fact, I think you are making quite a leap of reasoning in order to make that conclusion. I am also concerned about you singling out one of the factors that we have mentioned; that is, what we consider to be not enough experience on the court, and comparing it with some of the fine jurists, conservative or liberal.

I appreciate your opportunity for me to be able to give you rebuttal on those issues, and I think that when you take a look at the general experience of all of those jurists, and you take a look at Judge Thomas' experience as it pertains to employment law, and my focus is truly in the area of employment law, we are deeply, deeply troubled by what he has said about employment law, about the impact on employment law.

And I would like to stay this evening and debate employment law, privacy issues, disability matters, seniority systems, limitation of damage awards, arbitration clauses, job performance issues, workplace restrictions—many, many issues related and the Supreme Court decisions as it relate to it. But, in deference to the others here, I don't think you and I will be able to do that.

Senator SIMPSON. Oh, but it would be fun if we could do that.

Well, I appreciate that. Those are serious issues to you and you speak with power when you speak of them. And, unfortunately, or fortunately, depending on your point of view, that is what everybody does here. So, if everybody just got the answer out of him or her, whoever would be before us, as to only the things that they were just terribly gut-hard interested in, we would never get anything done in here. Absolutely nothing, especially on the issue of abortion. The Miranda rights.

Go look at Thurgood Marshall and how beautifully he blunted Senator Eastland, how beautifully he blunted Senator Erwin as they kept asking, "What are you going to do with Miranda when you get on the Court?" And he said, "I will not answer that question." Nor should this man answer this question.

Those are areas of controversy, discord. There is no reason for him to answer it, and he won't answer it. And neither did Judge Thurgood Marshall answer it in a question that was just exactly as controversial.

Ms. AXFORD. Senator, how do you perceive the role of this committee vis-a-vis the advice-and-consent function? And how far do you think you can go to ask a candidate to answer a question?

For instance, I am a litigator also, and when there is a witness on the stand or, I imagine, in Judge Thomas' courtroom, how far would someone get if a witness doesn't answer the question?

Senator SIMPSON. Let me share with you, Ms. Axford, that no one even asked anybody anything for 100 years in this Senate. Nothing was asked of these nominees, not one single thing. In fact, one of them sat outside the door and tapped, like it was a secret session, and finally he said, "Do you want to see me or not?" and they said, "No, we don't." One of them was asked eight questions.

We have done this because I guess the people must like it. We respond to the people. We are representatives of the people. But let's understand what this process is.

Ms. AXFORD. But this process when Rutledge was being considered there were 5 months of debates in the press, and certainly the Pony Express may have had to have brought record of those, or the telegraph or whatever the technology was. But thank the Lord, we are making progress. There are Americans, millions across the Nation, who are watching this legal process with the same interest as they watch as "LA Law." And this is an important function to the legal system.

Senator SIMPSON. I would respectfully say that that is the way we lawyers look at the world, but it is not really the way the American public looks at the world because our job is one singular thing: To find out the character, the integrity, the honesty, the quality of this man. That is what our job is to find out. Not his philosophy.

In fact, under the American Bar Association rulings of qualified and well-qualified and all the rest, that is all we are seeking, and that is our job to seek too. That same thing.

The CHAIRMAN. Ms. Axford, I think he has answered your question. I think he is dead wrong, but he has answered your question. [Laughter.]

And so, rather than litigate this thing—

Senator SIMPSON. Well, we find some lapse of judgment in our chairman.

Ms. AXFORD. May I respond to one thing that he said, so that there is not a misunderstanding in my position on the record as the position of my organization?

The CHAIRMAN. Surely. You are just going to encourage the man now.

Senator SIMPSON. No, I won't. I won't. I won't. I promise. I have been very good. I think I have.

The CHAIRMAN. You have. You have. You have.

Senator SIMPSON. Thank you.

Ms. AXFORD. If you hear me as saying this is a matter of philosophy, I need to clarify. I don't think it is a matter of philosophy. It is a matter of concern about credibility. It is a matter of inconsist-

ency. And, in the courtroom when there is an inconsistency, and when there are witnesses that come up behind a chief witness and there is such inconsistency, and I think he said this, and someone else thinks he said that, then it is time to find out really what is thought.

And the philosophies of the jurists are going to be different, and I think that people on either side of the issue have to gain by clarity. I am concerned about the potential of executive branch influence preventing the purity, the truth, and the clarity of this man's thinking.

The CHAIRMAN. Thank you very much. I would point out for the record that the reason we didn't use to ask questions is they use to just summarily vote against nominees based on their philosophy. I am one who thinks philosophy always has been taken into account. The more the President takes it into account, the more the Senate historically has taken it into account. When he doesn't, the Senate doesn't. When he does, the Senate does.

And I might point out just for the record—I can help the Senator—Earl Warren, he asked about Earl Warren, was Governor of the State of California for 10 years. He was a Vice Presidential nominee in the Republican Party. He was a district attorney, and he had a distinguished legal career.

Justice Felix Frankfurter was assistant attorney for New York.

Senator SIMPSON. Well, Mr. Chairman, I really don't need that rehabilitation. I was talking about the issue of judicial experience. I know what those men did. I will take judicial notice of that.

The CHAIRMAN. Right.

Senator SIMPSON. I don't know what is appropriate about that. I was responding to the issue of judicial experience, and that is only what I was responding to.

The CHAIRMAN. I misunderstood you. Because the men you named, with the exception of Warren, were the most distinguished lawyers in America at the time they were nominated. The most distinguished lawyers in America by everyone's account.

Senator SIMPSON. Let the record show that I would concur with that, and let the record also show that none of them had one whit of legal judicial experience.

The CHAIRMAN. Now, having said all that, let me yield to—no, I am not going to yield to you—

Senator SIMON. I thought you were going to skip Senator Specter.

The CHAIRMAN. No, I wasn't going to skip him. You are looking out for him, and I appreciate that. I was looking to see if Senator Kohl had come in. He has not. I yield to my friend from Pennsylvania. The hour is getting late, and the Senator from Wyoming and I probably—we are good friends, and this isn't getting us anywhere.

Senator SPECTER. Ms. Axford, I agree with you that there are many people, I don't know if there are millions, who are watching this hearing at this moment. But had any chosen to watch you and Senator Simpson, it would have been better than "LA Law" for that last exchange. [Laughter.]

And, by the time we get to midnight, which is not too far away, this hearing could even become livelier.

Let me pursue for just one moment, Ms. Aiyetoro, the question of the decisions, and I don't want to place too much emphasis on it. But the case that you cite in your brief, *United States v. Rogers*, or that you cite in your statement, was a case with Judge Wald and Judge Ginsberg, who I think it fair to say are, at the minimum, not conservative or right-wing judges. And it involved a case where the prosecution offered some evidence of a prior conviction in a paper which was not objected to by the defense. And the court went into some detail explaining that it was a tactical decision, and in that context it could not be assigned as error.

And, as I read the case, I saw no problem with his decision. It was not suggestive of something conservative or right wing or extreme. I wondered if you had had a chance to see *United States v. Lopez*, which was not an opinion by Judge Thomas, but one where he was on the panel and one where I questioned him, because this was very much on the other side of the fence. This involved a sentencing and the Uniform Code prohibits taking into consideration socioeconomic factors.

And the U.S. attorney said that to take into account Mr. Lopez's background, his family, his home life, his dual—his approach from both Hispanic and a U.S. point of view, and Judge Thomas joined the court in allowing that to come in over the objection of the prosecuting attorney, which suggests some expansiveness.

So that I think that Judge Thomas' record shows some balance there. And his testimony was, in response to the question on activist, was the Warren court activist in giving defendants rights, he supported the Warren court. There is nothing in his writings that I know of, and I believe I have read all of this writings, that say anything to the contrary.

What I would ask you on the issue of qualification is how you would weigh the views you have expressed with the testimony of Prof. Drew Days who, although not in favor of Judge Thomas, said that he had the intellectual and educational qualifications, and Judge John Gibbons, formerly Chief Judge of the third circuit, who knew him as a member of the Holy Cross board and knew him for years, and Judge Gibbons, again, is not a conservative judge, he said he was well qualified, and Dean Calabrese of the Yale Law School who said he was at least as well-qualified as recent nominees.

How would you assess those evaluations compared to your own.

Ms. AIYETORO. I would first like to point out our concern with the criminal cases because the points you started off with was questioning the position on the criminal cases.

The concern that we have is not whether or not he agrees or disagrees with the other Justices on his panel. The concern we have is that of all the criminal cases that he has had the responsibility to write the decision, in all but one, in our understanding, or research, he has supported the Government's position. The Government's position that whittles down some of the rights of the defendant, and that is our concern.

We, I think, say, or I will say today if we don't, that clearly even though he has been on the bench 17-18 months he has not ruled on enough decisions to make a strong definite position on where he is

as a Justice, but it appears that he is leaning—in all but one he supports the Government, and that is our concern.

Senator SPECTER. Well, by supporting the Government's position that doesn't necessarily mean he is wrong. If it is *United States v. Rogers*, which you cite, I don't conclude that he was wrong there.

Beyond supporting the Government's position, are you contending that he was wrong in doing so?

Ms. AIYETORO. We think, Senator Specter, that because of the fact that the criminal arena now, the criminal justice arena now is disproportionately dealing with people of color that it is important that procedural due process rights of the defendants get supported to the *n*th degree, to make sure that we are not convicting people who are not guilty and sending people to prison who are.

It seems to me, not that I disagree with this specific opinion, but the point that we were attempting to make is that even though Judge Thomas may have said, and he has said in several of the criminal defense opinions that he has authored, that indeed it was a problem, indeed the Government was wrong. But he finds harmless error.

And it is our opinion that we have to go further. We can't just say harmless error when you are looking a national prison statistic that almost 50 percent of the people that are incarcerated in this country are black and more than 50 percent are people of color.

And that is not to say that we think that he should go the other way and never uphold the Government, but that we feel that there has to be—that the harmless error issue becomes more and more problematic when you are looking at the kind of criminal justice system we have now. So that is our position.

The other point that I believe you asked me was whether or not—how I would view his intellectual capability, and you named other persons who had said that he was intellectually qualified. Our opposition to him is not based on whether or not he has the intellectual capability to be a judge. Not many people go and graduate from Yale who don't have the intellectual capacity to qualify to be a judge. We are not taking the position that he is unqualified because of that.

We are opposing him because of his record; because of his record in all of his public office that appears to undermine the right of people of color, women, and the disenfranchised. We take that position.

We take the position also, as I said in my oral testimony, that his testimony and his record also indicate someone that is not really 100 percent aboveboard in many ways, and we've given examples of that. For those reasons, we oppose him. Not because he is not smart enough. Not because he didn't go to law school. Not because of anything else, even though we think that he doesn't have the kind of stellar background that many other justices have.

Senator SPECTER. One final brief question, if I may, Mr. Chairman.

The CHAIRMAN. Yes.

Senator SPECTER. Reverend Taylor, you said in your statement that Judge Thomas has not, in his years of public service, conducted himself as one who can think clearly for himself. Did you see

his testimony or any part of his testimony during his 4 days before this committee?

Reverend TAYLOR. Yes.

Senator SPECTER. And after seeing that, you think he cannot think clearly for himself?

Reverend TAYLOR. Well, his past issue has been to mimic the administration points of view, and I think he was doing that in the hearing by evading questions that were put before him.

Senator SPECTER. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I wish all the witnesses would stop inflating the Senator from Pennsylvania's ego by suggesting that you have to be smart to have graduated from Yale Law School. The last panel said something complimentary about him. From now on, the Chair rules, no more complimentary comments about the Senator from Pennsylvania.

Senator SPECTER. Yale has done very well at these hearings.

The CHAIRMAN. In a sense that it's been present, it has. Now with that, I thank the panel very, very much.

Mr. SCHULDER. Mr. Chairman, before we leave, could I enter into the record the statement of two older persons, Ray Albano and Georgiana Jungels, who came here—one from Seattle, one from Buffalo—to give testimony on ADEA treatment of their work and were unable to testify? They've asked me to ask you to submit it for the record.

The CHAIRMAN. Without objection, it will be submitted for the record.

Mr. SCHULDER. Thank you.

[The statements of Mr. Albano and Ms. Jungels follow:]

Statement of Ray Albano  
on the Nomination of Judge Clarence Thomas  
To the U.S. Supreme Court

Senate Judiciary Committee  
September 19, 1991

My name is Ray Albano. I'm 60 years old, and I live in Seattle, Washington. I would describe myself as politically conservative. I have never voted for a Democrat for President, and the only Democrat I ever did vote for was Scoop Jackson. I have served as leader of the 21st District Republicans in Snohomish County, and as a Lynwood City Council member.

Seven years ago, I became the victim of age discrimination. What happened to me at the EEOC under the direction of Clarence Thomas is why I oppose his nomination to the U.S. Supreme Court. The EEOC did all it could to not help me. That agency did everything possible not to enforce the very law that it was charged with enforcing. In fact, the EEOC let the statute of limitations run on my claim, and it is only because of a special act of Congress and my own persistent efforts that I have gotten anywhere. And I know that my experience was not unique.

From 1973 to 1985, I worked as a sales representative for a major corporation. In 1983, I found out that the company had a plan to force out its older workers. Their plan became very real to me when I was denied a promotion. I was the most qualified candidate for the job, and the person selected was not even 25 years old. I asked to be

considered for another position, but was told that this was not a possibility either. I was told that both jobs were "young men's jobs."

I have degenerative arthritis, and in 1984 I had my hip replaced. For about two weeks, I was in the hospital, and I was on medical leave from October 1984 until January 1985. During this time, my employer expected me to carry a full workload. In fact, the day after I was released to return to work, my supervisor put me on probation, citing poor work performance. He also moved several of my key accounts and reduced my commissions. He told me that I would now have to call on retail stores, and I would have to help build displays for these stores. This meant carrying and lifting heavy cases -- work that was very painful and difficult for me because of my surgery. I was told that I had to do it -- I had no choice -- if I wanted to keep my job. I was so scared and upset that I would go home at night and cry. I couldn't afford to lose my job, and I tried to do the best I could, but every day, my supervisor would find something else wrong with my performance. Finally, I decided that I had no choice but to file an age discrimination charge.

I went to the EEOC in February 1985. I told them about the promotions I had been denied and why I believed it was because of my age. I told them about the company's plan to fire older workers. I told them about my surgery and the pressures placed on me during my medical leave. I told them about being placed on probation and my commissions being reduced the day after I came back to work. I told them that I had been given a job assignment that I found almost physically impossible to do, and that I

had a doctor's letter confirming this. I told them that I believed that my employer was harassing me to make me quit my job.

Despite all this, all the EEOC would do is put a claim of a denied promotion in the charge. They told me that I would be assigned an investigator and I could tell the investigator about all the harassment. I tried to discuss it further, but got nowhere. I was told to sign the complaint as it was drafted, so I did.

In late February 1985, I tried to discuss the harassment with the EEOC investigator. In fact, conditions at work had gotten worse. I was told, however, that I could not amend my claim.

Finally, all the abuse at work took its toll. I couldn't handle it any more -- either physically or emotionally -- and so I left my job on March 1, 1985. A few weeks later, I called the EEOC to tell them what had happened. I again asked if the charge should be amended to reflect the harassment. I was told that was not necessary.

Altogether, I had about 14 conversations with the EEOC. I had to initiate every call; they never contacted me. In many of these conversations, I tried to discuss the harassment and whether I needed to amend my complaint. Each time I was told no. I never received anything in writing from the EEOC telling me what was happening with my case. Finally, in February 1987, the EEOC told me that they were not going to do anything about my charge, and that it was too late to file suit.

I didn't do anything after that, because I thought there was nothing I could do. Then, I heard on the news that Congress had extended the statute of limitations for Age Discrimination claims. So, I found a lawyer, who filed suit for me in federal court. I lost. One of the reasons was that the statute of limitations had run.

I appealed my case to the Ninth Circuit Court of Appeals, where I finally won. On August 30, 1990, the court ruled that my suit could go forward. Finally, I have a trial date set for next April. The Ninth Circuit ruled that I had done all that could reasonably be expected to protect my rights, and that the EEOC had been at fault.

I flew here from Seattle because I think I have an important story to tell. I know that what happened to me at the EEOC was not isolated or unique. In fact, one of the EEOC case workers told me that they were simply following policy from Headquarters. They had received memos from Washington, D.C. telling them to get rid of their cases as fast as they could. And I was one of the many victims. As head of the EEOC, Clarence Thomas tried to gut the very law he was charged with enforcing. His record makes me question his respect for established law that may be at odds with his personal beliefs. I am here to oppose his confirmation to the U.S. Supreme Court.

Statement of GEORGIANA JUNGELS  
on the Confirmation of Judge Clarence Thomas  
to the U.S. Supreme Court

Senate Judiciary Committee  
September 19, 1991

My name is Georgiana Jungels. I have worked for over 30 years as a teacher, and since 1974 I have been a professor at the State University of New York.

I am here to describe my experience with the EEOC under the "leadership" of Clarence Thomas and the personal toll it took on me. I'm a college professor. I've worked for a long time. I've learned how to combine a career and four children. I've learned a few things. But a person can't work 7 days a week. A person cannot and should not have to constantly monitor a public agency to make sure it does its job. When I filed my complaint with the EEOC, I believed that this agency would do what it is supposed to do -- help victims of employment discrimination. It did not. From the very beginning, my case was mishandled.

In February, 1985, I filed an age and sex discrimination claim against my employer with the EEOC. My employer had eliminated my position as director of a graduate studies program. However, four months later, this position was "recreated" and filled with a male. Later, it was filled with a younger woman. The very first letter I received from EEOC was addressed to "Miss Jordan." I don't know who that is, but clearly that is not me. I notified the Buffalo office of the error, and they sent me a corrected letter. In that letter, the EEOC stated that the initial investigation would be

done by the New York State Division of Human Rights, and that I would be hearing from this agency in the near future. Ten months went by and I did not hear a thing. So I called the regional director of the New York Division of Human Rights. He told me that what the EEOC had told me was totally incorrect. He told me that, in fact, EEOC had asked the Division of Human Rights to waive their right for initial investigation so that the EEOC could do it themselves.

At that point, I called the director of the EEOC local office in Buffalo. I asked him three very simple questions. One, what had been done to date; two, what was going to be done; and three, when would it be done? I was told that my case was "under investigation," and there was nothing further they could tell me. At the same time, I got correspondence from them with incorrect charge numbers. I wrote back with the correct information.

Every time I called, the EEOC Buffalo office told me that my case was under investigation. Each time, I asked for a clear plan of action. At the point when there was only four months remaining before the end of the statute of limitations, I asked what they were going to do. At this point, I asked both Senator D'Amato's office and Senator Moynihan's office for some assistance.

The Senators contacted the EEOC on my behalf, and I think they were as shocked as I was by the response. Basically, in the entire eighteen months, nothing had been done. For example, the EEOC had requested some information from my employer, but then did nothing at all with it. And their only response was to ask for my forgiveness.

I continued to contact the EEOC. I continued to ask for information. They told me that they had misplaced my file. Did I have a copy of the original charge? I Xeroxed the original charge. I forwarded it to them, and I asked if I could look at my file to make sure nothing else was misplaced. And I was told that I was not allowed to do that. To date, I do not know whether or not the thousands of pages I have submitted to the EEOC Buffalo office are, in fact, in my file, or if they, too, have been misplaced.

Eleven days before the statute of limitations was to run, I met with the director of the local regional EEOC office. I was told: "You must go into court yourself. There's nothing we can do on your behalf. You don't need a letter. You just go do that yourself, or you will have given up your right to equal protection under the law." I asked for a response to the same questions I had been asking for 2 1/2 years: "What have you done; what will you be doing; and when will you be doing it?" And I was told that it was the policy of the EEOC not to respond to such questions in writing.

On the very last day before the statute of limitations was to run, I went down the U.S. District Court in Buffalo, New York. With considerable assistance from the Clerk of the Court, I tried to fill out the necessary papers to file a complaint. I sent a copy of what I had filed to the director of the EEOC Buffalo office. Monday morning -- the very next working day -- he called me. He said, "You have filed the wrong form." I said, "Pardon me. I filed the form that I was advised to file by the District Court Clerk." He said, "I think it's the wrong form." I said, "Well, thank you for calling me and bringing this to my attention. I will call the Clerk."

And so I spoke with the Clerk -- who, I must add, had spent an hour and a half

reading through a book that was an inch and a half thick in order to advise me appropriately on how to file my complaint. He told me that the forms I had used were the only ones they had. He told me not to worry. If the Judge finds an error in the form, he would advise me and it would be corrected.

I believe that the EEOC's repeated delays and failure to act on my behalf sent a very clear message to my employer. That message was: "Do as you please." And my employer listened. During this time, I was assigned the highest workload of any faculty member in the entire state university system. While on sick leave for a physical injury, my employer sent me letter after letter and made phone call after phone call to me at home, demanding that I respond immediately. I reported all of this to the EEOC, and they did nothing.

When I returned to work, the harassment escalated. I was even disciplined for questioning my employer's treatment of me! I filed a retaliation charge with the EEOC. Four months later, with apparently no investigation, the EEOC dismissed this charge.

What I want to underscore is that instead of acting as my advocate, the EEOC functioned as an obstacle. Instead of removing the prejudice in my workplace, the EEOC sanctioned it. While mine is a single story, it has been multiplied thousands of times. When I heard that President Bush had nominated Judge Thomas to the Supreme Court, I couldn't believe it. And now I'm here to question why the U.S. Senate would confirm someone who failed to follow the very law he was charged with enforcing.

The CHAIRMAN. Now our last, but clearly not least, panel. We've combined two panels. After consultation with Senator Thurmond we've combined the two panels. Our next panel, which is the 10th panel today and the 12th panel. Each of these witnesses is testifying in support of Judge Thomas' nomination.

They are Ed Hayes, attorney for Baker & Hostetler here in Washington DC, who is here on behalf of the Council of 100. And David Zwiebel—I hope I am pronouncing it correctly—who is general counsel and director of government affairs at Agudath Israel. And John Palmer, president and chief executive officer of EPD Enterprises; the largest food service management operator in the four states of Kansas, Missouri, Iowa, and Nebraska. And J.C. Alvarez, who is vice president of River North Distributing in Chicago, IL. Ms. Alvarez worked with Judge Thomas while he was on Senator Danforth's staff and while he was at the Department of Education, as well as when he headed EEOC.

Welcome, all. Why don't you begin your testimony in the order in which you've been called.

Excuse me, the Senator from Alabama.

Senator HEFLIN. There are some witnesses that I know from my State that were unable to come that were on the witness list. I assume that the statements of any witnesses who were on the witness list can be admitted into the record.

The CHAIRMAN. Yes, they will be. They'll all be admitted.

[The prepared statements referred to follow:]

**Remarks by United States District Court Senior Judge Jack E. Tanner Before the United States Senate Judiciary Committee Upon the Nomination of Judge Clarence Thomas To Be An Associate Justice of the Supreme Court of the United States.**

I was born in Tacoma, Washington, and I have lived there all of my life. I came from a family where my father was involved with the immigration of longshoremen and seamen on the Pacific Coast of this country. My father was a personal friend of Harry Bridges, the longtime leader of the Waterfront workers. I was a baseball player, and I thought good enough to play professional baseball except for the color line.

I became a member of the longshoremen union in Tacoma just before I went into the Army in World War II. I, of course, was a member of an all Black unit with white officers. We were known as one of those "Jim Crow" units in the armed forces of the United States. But, it was because of my experience in the army that caused me to go to law school. I went to law school under the GI Bill.

After law school I went into private practice. I represented anyone and everyone, including Blacks, Mexicans, Indians, and Orientals. I became a branch president of the NAACP, then an area President, then I served for seven years on the Board of Directors of the NAACP. I marched in the South, North, East and West in the civil rights demonstrations. I knew personally at the time all of the giants of the civil rights movement. I was a personal friend

of Medgar Evers before he was slain in Mississippi. I represented Indians in the State of Washington before the Supreme Court of the United States as to their treaty fishing rights.

I am a life member of the NAACP. I am a life member of the National Bar Association, and I am a member of the Judicial Council of the NBA as well as a Past Chairman of the council. I was one of the founders of the National Conference of Black Lawyers. I have received awards and recognition from all of these groups for outstanding contributions to the struggle for civil and human rights as well as for scholarship and justice in the federal courts. I have received recognition and awards from the National Association of Women Judges, and from the National Association of Blacks in the criminal justice system. I was honored by the members of the Federal Bar Association of the Western District of Washington for my contribution to fair play and justice in the Federal court.

I defer to no one as to the understanding and contribution to the ongoing struggle of men and women of all colors for civil rights and human dignity.

I think that I should say here that recently I have been appearing as a speaker at several grade schools in the State of Washington. The schools where I attended contained students of all

colors and backgrounds. I was amazed at the reactions to me when I appeared in my black robe. Their reactions and the responses of their parents was the most satisfying experience that I have had while on the Federal bench, and I am now in my fourteenth year of service.

My father was and I was, before I became a judge, active in Democratic politics.

I am here because of the most intense, unprecedented and harsh opposition, in the history of this country, to a nominee to the Supreme Court of the United States. The attacks have now also shifted to members of the Senate. There is no logic or reason for the attacks, whether from the right or the left. They are emotional attacks, based solely upon passion and prejudice, neither of which has any relevance to the qualifications or fitness of the nominee. I am most concerned with the concept of fairness and justice, which are the very foundation of our system of jurisprudence. These remarks that I am making are my own and do not purport to represent the view of any other person or organization.

I am also concerned because, I, too, appeared before this Committee under somewhat similar circumstances. I was the first Black person West of Chicago and North of San Francisco ever nominated as an Article III Judge. I was nominated by Senator

Warren G. Magnuson, the Chairman of the Senate Appropriations Committee. He formerly was, as several of you will recall, Chairman of the Commerce Committee, the committee where Civil Rights Legislation in the 1960's originated.

My nomination was immediately opposed by certain factions in the State of Washington. The opposition was led by a local newspaper. Senator Henry M. Jackson, concerned about the nature of the attack against my nomination, appeared at a news conference in Seattle and denounced the attack. Senator Jackson said that the attack against me was "only because he is Black" . . . "that, if Tanner was white, there would be no opposition to his nomination. . ." I think that I should say here that not one member of the Senate voted against my nomination.

As you know, Senators Jackson and Magnuson were both lifelong Democrats and ardent supporters of Civil Rights and human dignity for all. Both of them would know and understand why the President appointed Judge Thomas, and they would also understand that the President would not have nominated him if he was not qualified and fit to be an Associate Justice of the Supreme Court of the United States. There never has been a President of the United States who ever appointed a Black person to high judicial office or any other high office, when the person appointed was not qualified to do the job. That doesn't happen in America.

Several organizations have announced opposition to the Thomas nomination for a variety of specious reasons. He doesn't understand and appreciate the Black Experience, or his views on Civil Rights are inconsistent to Hispanics; he holds views dangerous to the rights important to Hispanics; he would undermine equal opportunity; he would oppose abortions for women. They say that he is opposed to quotas and affirmative action although he owes his own status to that policy; and, he is bent on, and espouses, a radical philosophy; that he doesn't like Jews, or labor organizations; that he is indifferent to the concerns of the elderly people; that he favors Catholicism over other religious faiths; that he does not fully understand the legal merits of issues; that he would sabotage the very laws he is supposed to enforce; and, that constitutional and statutory rights that Americans have enjoyed for years would be obliterated by a single stroke of his pen. It is also feared that he will apply "natural law" to deprive untold numbers of Americans of their life, liberty and property. The great debate among legal and political philosophers goes on and on. It means different things to different people. If you believe in either judicial activism or judicial restraint, right or left, then take your choice. One's viewpoint probably depends upon whose ox is getting gored.

The race to denounce the nominee has reached also a "lynch mob" atmosphere. The objective and goal of the opponents of the nominee is obvious, and that is to convince the Senate of the

United States that the nominee is not fit politically and ideologically to be an Associate Supreme Court Justice. There are, perhaps, some who are acting in good faith in opposing Thomas' nomination, but, at least, they are confused. They seem to believe that America is now at long last color blind, but the facts and reality are to the contrary.

The opponents of Judge Thomas' nomination are concerned that he might do this, or he might do that, or his confirmation will lead to some ideological shift in the Supreme Court, or that he is somehow outside the mainstream of legal thinking in this country, just because they do not agree with his sense of values or judicial philosophy, whatever it is that might be. Judge Thomas has sat, as a member of the United States Court of Appeals for the District of Columbia, for 19 months now, and his judicial philosophy is still uncertain and unknown. Yet, about 96% of the cases decided by that court are final decisions. What is certain and known about Judge Thomas is that he is independent and can't be put into a category. He is just where he should be. Speculation and hysteria, as to what the nominee might do, should not disqualify him from the Supreme Court. After all, no other nominee has ever been disqualified for such reasons. Judge Thomas understands, very well, the rule of law.

Let me take just a moment to explain to the members of the committee why I maintain that the opposition to the nominee is ill-

conceived and ill-advised. Most, if not all, of the opponents to Clarence Thomas' nomination appear to base their opposition upon what he might do to destroy or blunt a particular cause or program that they are interested in at the moment. They have been referred to at times as "special interests."

Where were those opposition leaders when former President Reagan nominated Chief Justice William Rehnquist? Where was the opposition when President Reagan nominated Justice Sandra Day O'Connor, or when Reagan nominated Justice Antonin Scalia? Where were they when President Bush nominated Justice Tony Kennedy and Justice David Souter? For the most part, they were silent, or at best offered only token opposition. But, the National Association for the Advancement of Colored People (NAACP), one of those groups opposing the current nominee, vigorously endorsed Justice Tony Kennedy and accepted him with open arms. Surely these organizations do not believe that their cause will fare any better under Justices Rehnquist, O'Connor, Scalia, Kennedy and Souter. Most were Appellate Court Judges, and all were nominated by a Republican President.

I realize, of course, that there is one obvious difference between Thomas and the previous nominees to the United States Supreme Court.

In my opinion, these groups are saying, and I include all those groups opposing Thomas' nomination, that we just do not trust Judge Thomas because he is a Black man. Support for this position comes from the prevalent view in America, and it is caused by the ravages and comes from the vestiges of slavery and the infamous Black codes which followed. The coloreds, (or Negroes, Blacks or African - Americans if you will ) could not be trusted with responsibilities and obligations that affected the armed forces, judicial, political, social and educational institutions of America. They could not be trusted to fight in the many wars of this country, although they did, and with courage and valor, and so it stood to reason that they could not be trusted with the life, liberty and property of white Americans.

In 1948 President Truman issued an executive order eliminating segregation in the armed forces of the United States. That order was the best thing that happened to the descendants of slaves since the Emancipation Proclamation. By that order Truman, in effect, acknowledged that Black members of the armed services could be entrusted with the security of America against all foreign powers. In 1949 President Truman appointed, for the first time in the history of the United States, the first Article III Black judge. He appointed William Hastie to the Third Circuit Court of Appeals. In 1955 the Supreme Court of the United States handed down the opinion of Brown v. Board of Education, the greatest decision ever handed down by the Supreme Court at any time in our history.

Thurgood Marshall was rewarded for his great victory in that case when President Lyndon Johnson nominated him to the Supreme Court of the United States. Once again, it had been recognized by the country that the Black man could be trusted.

Despite these significant strides toward equality, it was not until 1969 that a Republican President ever appointed an Article III Black judge. But, Richard Nixon did not make appointments of any Black to the Supreme Court, or to any of the United States Courts of Appeal.

In 1991, the United States went to war in the Middle East. The chairman of the Joint Chiefs of Staff of the Armed Forces of the United States was one Colin Powell, then a four-star general and a Black man as well. President Bush, as Commander - In - Chief of the Armed Forces, trusted the integrity, loyalty, training and experience of General Powell. He was, in fact, entrusting the security of the United States to a Black man. History will show that trust was well placed. It is my judgement that history will repeat itself, and one day show that President Bush, the first Republican President to ever do so, was right in entrusting to a Black man, the job of safeguarding the life, liberty and property of all Americans, by nominating Judge Clarence Thomas to the Supreme Court of the United States.

It defies logic and reason to say that since a Republican President has discovered, in 1991, another qualified Black man, that he should be rejected because he is Black. I would challenge and reject the suggestion by anyone, that America and the Supreme Court of the United States should be denied, for any reason, the Black Experience in America in 1991, or in any other time as long as America exists as a free nation. Just because a President appoints a person who has the same political philosophy that he has, it does not follow that the person nominated is not qualified or fit to sit on the Supreme Court.

Judge Thomas is just as well qualified to become an associate justice of the Supreme Court as were the 102 white males, 1 Black male and 1 white woman who have heretofore come before this body for advice and consent. In fact, because he has had the Black experience, he is better qualified than all but 2 members of the Supreme Court.

Neither the proponents nor the opponents of Judge Thomas' nomination seem to acknowledge, perhaps, the most important consideration, at this time in our history, that qualifies a person to sit on the Supreme Court. That most important qualification seems to be the nominee's ethnic and religious background. It just didn't happen that Antonin Scalia was the most qualified person when he was selected for the Supreme Court. He just happened to be

the most qualified person of Italian descent. It just didn't happen that Sandra Day O'Connor was the most qualified person when she was selected. She was, however, the most qualified female at the time. Tony Kennedy just happened to be of the Roman Catholic faith, and presumptively opposed to abortions. David Souter is somewhat of a mystery, but an educated guess would place him squarely in support of the President's political agenda.

This Committee can believe the President of the United States when he says that, "Judge Thomas is the best man for the job." Just because he happens to be a Black man does not disqualify him nor should it by any test or criteria. It has only happened twice, in our history, that a Black man has been nominated. It is highly doubtful that any of us in this room will see it happen again.

It is my judgement that there are a great number of Americans out there, and, yes, there are people throughout the world, who are watching this great drama unfold. It is also my judgement that the great majority of those Americans, white, black, brown, yellow and red, and of all religions and faiths, want to see Judge Clarence Thomas sitting as an Associate Justice on the Supreme Court of the United States. They want to see fair play and justice done to this man. They want to be able to point to this man and say to their children that they too can aspire to the highest court in the land; that they too can expect fairness and justice; and that they too can put their hopes and dreams in America where the rule of the

law, and not of man, reigns supreme.

In conclusion, let me just say, that despite the vicious, unwarranted and unprecedented attacks upon the nominee, he still stands tall. He has exhibited more than just plain character while under fire. This Black man has exhibited sheer guts and willpower, above and beyond the call of duty to his country. He has displayed courage and valor, in the face of the bitter criticism and abuse heaped upon him. Such valor and courage, in the time of war, is rewarded in the Armed Services of the United States, by an award of the Congressional Medal of Honor. What could be a greater test of character than that displayed by the nominee.



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 EDUCATION  
 PUBLIC WELFARE

**STATEMENT OF REPRESENTATIVE ALVIN HOLMES,  
 A MEMBER OF THE ALABAMA HOUSE OF REPRESENTATIVES,  
 BEFORE THE JUDICIARY COMMITTEE OF THE  
 UNITED STATES SENATE  
 SEPTEMBER 19, 1991**

Mr. Chairman and Members of the Committee,

I express my appreciation to each of you for allowing this statement to enter the records of the Judiciary Committee of the proceedings of Judge Clarence Thomas' nomination to the United States Supreme Court.

First of all, Judge Clarence Thomas talks about his childhood as if he is the only black person who suffered racist insults. The fact of the matter is that every black American in the south withstood indignities of segregation and "Jim Crow." Each of us can share a story of humiliation during the U.S. apartheid in the deep south.

It is very unfortunate that Judge Clarence Thomas attempts to lift his experience above that of others in the black community and it should be insulting to the committee that Judge Thomas has used such pandering tactics to ingratiate himself with the committee.

What is different about Judge Clarence Thomas and the majority of the black community in the deep south is that thousands upon thousands of black people marched, demonstrated, went to jail, were brutally beaten and, unfortunately, there were some who gave their lives standing up for their dignity until the walls of segregation and humiliation came tumbling down.

If Judge Thomas was so insulted during his childhood by the indignities of segregation, then where was he during the sit-ins, the freedom rides, the confrontation with Bull Connor in Birmingham, the confrontation in Albany, Georgia, the marching in Mississippi, the Selma to Montgomery march, the great march on Washington for jobs, and the march in Memphis, Tennessee? Judge Thomas was not among the multitude, yet he criticizes black people in masses and civil rights organizations that chipped, and continue to chip, away at the scourge of

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discrimination so that our constitution can be a living document for all Americans. Obviously, he was not concerned about the freedom of blacks because he never participated in any civil rights movements in the country to my knowledge. Instead, Judge Thomas criticized black civil rights leaders as "bitching and moaning all the time."

In regards to affirmative action, the southern states have a long history of denying black people equal employment opportunities. If it were not for various laws, rules and regulations concerning affirmative action to give the blacks an equal chance, much would be left missing.

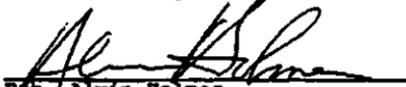
In the long history of most states in the nation, if it were not for different rules and laws dealing with set-aside programs and affirmative action, blacks would not have the opportunity to participate in the economic prosperity of this nation.

Further, Judge Thomas has taken a strong position against United States Supreme Court decisions dealing with the rights of poor and disadvantaged people. Judge Thomas states that he was once poor and now, since becoming successful, he, in my opinion, has turned his back on the poor and the disadvantaged of this country. There exists no positive record, to my knowledge, that Judge Thomas put forth any efforts to help the poor, the discriminated, the destitute, the old, and the black people of this nation.

I feel that, once on the Supreme Court, Judge Thomas will lead the Court on all civil rights matters. That his voice will be used to permit extreme discrimination to re-emerge. Moreover, if Judge Thomas is approved for the Supreme Court, in my opinion, it will send the wrong message to young black Americans that the way to be successful in life is to criticize the civil rights movement and civil rights leaders of this country and cater to the extreme conservative elements of this country that have always taken the position against the quality and freedom of black people.

Mr. Chairman and members of the Committee, thank you for allowing this testimony to enter into the records of your proceedings.

Please vote against Judge Thomas' confirmation.



Rep. Alvin Holmes  
State Representative and Chairman  
of the Affirmative Action Committee  
of the Alabama Legislative Black Caucus

# ***NACDL***

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**REPORT ON THE NOMINATION OF  
JUDGE CLARENCE THOMAS  
TO BECOME AN ASSOCIATE JUSTICE  
OF THE U.S. SUPREME COURT**

**Adopted unanimously by the NACDL Board of Directors  
August 17, 1991.**

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Report on the Nomination of Judge Clarence Thomas  
to Become an Associate Justice of the  
Supreme Court of the United States

On July 1, 1991, President George Bush nominated Clarence Thomas, a Judge of the United States Court of Appeals for the District of Columbia Circuit, to fill the vacancy on the Supreme Court of the United States created by the resignation of Associate Justice Thurgood Marshall. The NACDL opposes the nomination of Judge Thomas to serve on the Supreme Court.

1. Why NACDL Cannot Support the Nomination of Judge Clarence Thomas to the Supreme Court. Certainly, NACDL cannot affirmatively endorse this nomination. While Judge Thomas appears to have the intellect, temperament and legal ability to serve on the High Court, he has not clearly demonstrated a professional commitment to the ideals of individual liberty and justice for which the Association stands, particularly with respect to the rights of the criminally accused. Since becoming a lawyer, Judge Thomas has apparently never represented a private individual, much less an accused criminal. Nor has he otherwise shown particular concern for enforcing the rights of the individual against assertions of state power. It is not nearly enough that his appointment would help somewhat to restore the loss of critical diversity of personal background and life experience among Members of the Court occasioned by the resignation of Justice Marshall.

Except for two years as an in-house attorney for the Monsanto chemical company, Judge Thomas has always chosen to work for the state or federal government; his earliest responsibilities with the office of the Missouri Attorney General upon graduating from Yale Law School in 1974 involved arguing criminal appeals for the state. (To our knowledge, he has never either tried a case or presided over a trial as a judge.) As discussed in the reports of leading civil rights groups, his tenure as Chair of the EEOC raises serious questions about his devotion to the law and legal process, especially as regards the system of checks and balances among the three branches of the federal government. Judge Clarence Thomas does not merit an affirmative endorsement from the NACDL.

2. Why NACDL Opposes the Nomination of Judge Thomas. The NACDL opposes the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court for three reasons: lack of commitment to certain basic but threatened principles of criminal justice, a dubious sense of judicial ethics, and adherence to an unusual and dangerously ill-defined jurisprudential philosophy.

a. Lack of Commitment to Equal Justice and Due Process.

The first reason that NACDL should oppose Judge Thomas's nomination is that he has not demonstrated a commitment to certain basic principles of equal justice and due process for which this Association stands. Not the least of these is the Constitutionally-mandated role of the defense attorney in ensuring fairness in criminal cases. Nor is it certain that he accepts the exclusionary rule as a necessary means of enforcing of Fourth, Fifth and Sixth Amendment rights, or that he would demand the most scrupulous fairness in the administration of capital punishment if the death penalty is not to be abolished (as NACDL would prefer). (If Judge Thomas opposes the death penalty, as does his mentor Senator Danforth, or believes in strict limits on its application, he has never said so publicly.) Finally, we do not know whether he supports the vital role of the federal courts, exercising their constitutionally-mandated habeas corpus power, to review the fundamental fairness of criminal judgments that have been upheld in state court.

Judge Thomas has had little or nothing to say publicly about any of these most critical issues, nor are we aware of any privately-expressed opinions. His views on other civil rights and civil liberties questions, while not directly applicable in the context of defendants' rights, may provide some guidance. In addition, his support for the exercise of executive power and disdain for that of Congress and the judiciary, as noted below, strongly suggest that he would take unsatisfactory positions on these issues. Because his views are not known with certainty, however, NACDL urges the Senate to inquire closely during the confirmation process into Judge Thomas's views on basic principles of equal justice and due process, as they pertain to the rights of the accused.

b. Lack of Ethical Sensitivity as a Judge. Attorneys who have argued criminal appeals before Judge Thomas find him to be intelligent, courteous, attentive and well-prepared on the bench. We do not fault him on any of these grounds. Nevertheless, his failure to recuse himself when his impartiality could reasonably be questioned does raise a serious concern about his ethical judgment and ability to separate personal bias from official judicial responsibility.

Most troubling is Judge Thomas's record on the Oliver North case. Judge Thomas publicly praised Col. North in several 1987 and 1988 speeches and in a 1989 article. One speech lauded North for having done "a most effective job of exposing congressional irresponsibility." Remarks at Wake Forest Univ., April 18, 1988, at 21 (referring to him familiarly as "Ollie North"). Nevertheless, despite holding strong personal views in support of this defendant, Judge Thomas did not disqualify himself from voting on North's appeal. Specifically, Judge Thomas participated in the vote to deny rehearing in banc in United States v. North, 920 F.2d 940, 959 (1990), the decision which overturned North's

convictions for endeavoring to obstruct Congress (and other charges). Since by his own public admission Judge Thomas had an extrajudicial bias in favor of a party, it is beyond peradventure that he should not have voted in the Oliver North case. Two other members of the D.C. Circuit (Judges Mikva and Edwards) declined for reasons of their own to participate in that vote.

Also of concern to the committee is Judge Thomas's failure to recuse himself in Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C.Cir. 1990). In that case, he wrote the opinion overturning a large damage award against a company owned by members of Danforth family, and of which his close friend and mentor, Senator Danforth, is an heir. Again, it seems apparent that Judge Thomas's impartiality in that situation could reasonably be questioned, requiring him to disqualify himself.

c. Dangerous "Natural Law" Philosophy. Like Robert Bork before him, Judge Thomas has an unusual jurisprudential view of the Constitution, but it is not Bork's "originalist," pro-government, anti-libertarian view. Thomas has consistently endorsed a "natural rights" theory of the Constitution, suggesting that the Constitution should be interpreted according to an extra-legal standard of right and wrong that humans can deduce from a study of "human nature," revealing the "laws of Nature and of Nature's God." Judge Thomas states that the "revolutionary meaning" of America is the basing of its government "on a universal truth, the truth of human equality." 30 Howard L.J. 691, 697 (1987). NACDL recognizes that this philosophy was indeed shared by those who signed the Declaration of Independence and by many who framed the Constitution as well. It was invoked by some of the abolitionists, such as Frederick Douglass, who argued that nothing in the original Constitution endorsed slavery; indeed, Judge Thomas has drawn on that tradition in support of his view that Brown v. Board of Education was decided the right way for the wrong reasons. (In the same essay, he also relies on the Rev. Martin Luther King, Jr., Attorney General Edwin Meese III, President Ronald Reagan, St. Thomas Aquinas, and Tom Paine, all within two paragraphs.)

Curiously coupled with Thomas's "natural law" argument is an expressed disdain for the right of privacy, as applied in Griswold v. Connecticut and Roe v. Wade, on the basis that privacy is not explicitly identified in the text of the Bill of Rights. The Ninth Amendment declares that such unenumerated rights exist and are to be protected. Failure to recognize that the right of privacy extends beyond the confines of the First, Fourth and Fifth Amendments leads inexorably to overcriminalization and abuse of state power. NACDL must not forget that the laws challenged in Griswold and Roe carried criminal penalties.

If we knew that "human equality" were the only "universal truth" that Judge Thomas finds behind (or above) the Constitu-

tion, and if we were confident that he is deeply committed to applying this truth to women's lives as completely as to men's, we might be less uneasy with this "natural law" philosophy. But Eighteenth and Nineteenth Century ideas of "human nature" spell indifference to the problem of poverty, and personal and professional oppression for women in today's world. The Supreme Court explicitly invoked "nature herself" and "the law of the Creator" to hold in 1873 that a woman could be refused the right to practice law. Moreover, many traditional views of human nature are fundamentally punitive and unforgiving, and have profound implications for criminal law which are contrary to NACDL's understanding of the "liberty" which is protected by the Constitution. Judge Thomas has not clarified whether the view of "human nature" that he believes to lie behind the Constitution is an unchanging one, nor which one it is.

Likewise, whose appreciation of "nature's God" informs Judge Thomas's "natural law"? We fully support the command of Article VI of the Constitution that "no religious test shall ever be required as a qualification to any office or public trust under the United States," and we condemn any suggestion that a nominee's religious opinions, as such, could be disqualifying. But this is because we believe that the Constitution invites a broad diversity of religious and nonreligious opinions in government. When a judicial nominee states that an understanding of "God's law" should inform Constitutional decisionmaking, however, it becomes incumbent on him to reveal what that understanding is. Judge Thomas's failure to make this clear in any of his dozen speeches and eight published articles advancing a "natural law" interpretation of the Constitution suggests that he may draw on an assertion of what is "natural" merely to justify a personal, political or philosophical agenda.

Judge Thomas believes that the "task of those involved in securing the freedom of all Americans is to turn policy toward reason rather than sentiment, toward justice rather than sensitivity, toward freedom rather than dependence--in other words, toward the spirit of the Founding.... The first principles of equality and liberty should inspire our political and constitutional thinking." 30 Howard L.J. at 699, 703. Some of these words NACDL could wholeheartedly endorse. Yet they do not seem to mean the same to Judge Thomas as to us: "Such a principled jurisprudence would pose a major alternative to ... esoteric hermeneutics rationalizing expansive powers for the government, especially the judiciary." *Id.* (emphasis added). Our principal concern, of course, is with that final twist. Who will check prosecutors' and politicians' "ration=al=iz=ation of] expansive powers for the [executive branch of the] government," to be used against the criminally accused, if not "the judiciary" in its interpretation and application of the Constitution, especially the Bill of Rights? NACDL believes that a powerful and independent judiciary, devoted to even-handed enforcement of the "first

principles of equality and liberty," is essential for "securing the freedom of all Americans." We also believe that "justice" is not an alternative to "sensitivity"; without sensitivity there can be no justice.

Judge Thomas, who has served on the D.C. Circuit less than a year and a half and was not previously a judge, is the author of only seven published opinions on appeals of criminal convictions, all in drug cases. (He has participated in another ten or so decisions that resulted in published opinions by other judges, and about 20 unpublished affirmances, in some of which he wrote unpublished memorandum opinions. He does not appear ever to have concurred separately or dissented in a criminal case, which may indicate a relative lack of interest in the subject.) The opinions on their face are thoroughly researched, lucidly written, and temperate in tone. None breaks new ground, either for the government or for the defense. In these cases, Judge Thomas explained the affirmance of convictions over claims involving, for example, asserted evidentiary insufficiency, severance, denial of continuance, search and seizure, and definitions of terms in the Sentencing Guidelines; in other words, the routine issues seen in federal criminal appeals. As a Supreme Court Justice, however, he would face far more difficult issues, and would have far more freedom from the strictures of established precedent (if he were inclined to exercise such freedom) than as a circuit Judge.

A handful of Judge Thomas's opinions do show a gratifying independence from prosecutorial argument. In United States v. Long, 905 F.2d 1572 (1990), he overturned a conviction for "using" a firearm in connection with a drug offense, where the unloaded gun was found between the cushions of a sofa. It might seem easy to say that this evidence was insufficient, but a jury had convicted, and a judge had upheld that verdict and imposed the mandatory five year sentence. The truth is that many if not most appellate judges today would have affirmed, perhaps without publishing an opinion; the concept of "using" a firearm has been diluted to meaninglessness in several other circuits. Obviously alluding to that fact, Judge Thomas wrote, "As an appellate court, we owe tremendous deference to a jury verdict; we must consider the evidence in the light most favorable to the government.... We do not, however, fulfill our duty through rote incantation of these principles followed by summary affirmance." 905 F.2d at 1576. In the same case, Judge Thomas's opinion goes out of its way to salvage the appellate rights of a defendant whose lawyer filed the required notice one day late, rejecting the prosecutor's plea to dismiss the appeal outright.

In United States v. Rogers, 918 F.2d 207, 212 (1990), while upholding the admission of "prior bad acts" evidence, Judge Thomas's opinion rejects the argument that the defense attorney's acquiescence in a cautionary instruction had waived any objection

to the admission of the questionable evidence. The opinion explicitly and accurately recognizes the legitimate tactical decisions a defense attorney must make in the midst of trial when an objection to prejudicial evidence has been overruled. And in United States v. Barry (Farrakhan and Stallings v. U.S.), 1990 WestLaw 104925 (1990), Judge Thomas participated in issuing an unsigned order requiring a trial judge to consider the First and Fifth Amendment rights of controversial, allegedly psychologically "intimidating" supporters of a criminal defendant to attend his trial.

These few commendable decisions, however, are greatly outnumbered by those of Judge Thomas's rulings which brush off troubling appeals. Especially disturbing are the opinions which demonstrate a cold indifference to the realities of the criminal justice system's harsh, discriminatory impact on the poor and uneducated. In United States v. Jordan, 920 F.2d 1039 (unpublished decision, available on WestLaw), Judge Thomas joined an unsigned opinion in which a defendant was denied a two-point reduction under the federal sentencing guidelines, costing him an additional 2½ years in prison, because his inability to raise the required bail to secure his release before trial prevented him from fulfilling an offer to cooperate with the authorities. Viewing the case as if the defendant were claiming some benefit on account of his poverty, the court invoked against him a Sentencing Commission rule that "one's socio-economic status 'is not relevant in the determination of a sentence.'"

Similarly, in United States v. Poston, 902 F.2d 90, 99-100 (1990), Judge Thomas's opinion passes without comment the transparent, self-contradictory lies of the arresting officers about whether promises of benefit were given to the father of a youthful arrestee and instead parses like the words of a business contract the father's testimonial recollection of what was said to him at the stationhouse. The result is an icy justification of the prosecutor's later refusal to give the defendant the benefit of a good word at sentencing so as to relieve him from an otherwise mandatory five year prison sentence for knowingly giving a ride to a drug dealer. If the Jordan and Poston cases illustrate what Judge Thomas means by "justice [without] sensitivity," NACDL must demur.

**Conclusion.** As discussed, Judge Thomas's record reveals several points worthy of favorable comment. Nevertheless, NACDL opposes the nomination of Judge Thomas for three basic reasons: his lack of demonstrated commitment to equal justice and due process, his failure to recognize the need for recusal where his impartiality is open to question, and his adherence to a philosophy of constitutional interpretation and judicial action which is outside the mainstream of contemporary thought and leads to unacceptable departures from the duty of the courts to enforce fundamental rights.

In addition, we are very concerned that Judge Thomas's views on the enforcement of civil rights laws, as expressed in both word and deed during his tenure as chair of the EEOC, bode ill for his willingness to enforce civil liberties, including those of the criminally accused. We hold in highest regard the expertise of such sister organizations in the broader civil rights and civil liberties community as the NAACP, the Leadership Conference on Civil Rights, the National Conference of Black Lawyers, the Congressional Black Caucus, the Alliance for Justice, the National Abortion Rights Action League, the Women's Legal Defense Fund, the National Organization for Women, AFSCME, and others which have publicly announced their opposition to this nomination. We are concerned that his unique legal philosophy and his laissez-faire attitude toward civil rights point to an approach to criminal law which is very punitive, rigid and unforgiving, and ultimately extremely dangerous to individual liberties.

As this report notes, there are several areas in which Judge Thomas's views are not yet entirely clear, and where we hope the Senate Judiciary Committee will press for more definite answers before considering confirmation. The record already available however, requires that NACDL oppose the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court of the United States.

Members of the Committee:

Peter Goldberger, Chair, Philadelphia, PA  
 Samuel J. Buffone, Washington, DC  
 Nina Ginsberg, Alexandria, VA  
 Prof. William W. Greenhalgh, Washington, DC  
 William B. Moffitt, Alexandria, VA  
 William H. Murphy, Jr., Baltimore, MD  
 Prof. Charles J. Ogletree, Cambridge, MA  
 Alan Ellis, Mill Valley, CA, President of NACDL, ex officio

**THE FUND FOR THE**  
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**MAJORITY**

1600 Wilson Blvd., #704, Arlington, VA 22209  
(703) 522-2214

Testimony of  
Eleanor Cutri Smeal  
President, The Fund for the Feminist Majority  
Before the Senate Committee on the Judiciary  
on the Nomination of Clarence Thomas  
for Associate Justice of the Supreme Court  
September 20, 1991

**Testimony of Eleanor Cutri Smeal  
President, The Fund for the Feminist Majority  
Before the Senate Committee on the Judiciary  
on the Nomination of Clarence Thomas for the Supreme Court**

I am Eleanor Cutri Smeal, President of the Fund for the Feminist Majority, and I come before this Committee to express strong and unequivocal opposition to the nomination of Clarence Thomas as an Associate Justice for the United States Supreme Court. My testimony was prepared with the assistance of Erwin Chemerinsky, distinguished professor of constitutional law at the University of Southern California.

The Fund for the Feminist Majority in its very name raises the conscience of the nation that today in national public opinion polls a majority of women identify as feminists and a majority of men identify as supporters of the women's movement. The Fund for the Feminist Majority specializes in programs to empower women and to achieve equality for women in all walks of life.

During part of the period Clarence Thomas served in the government, first at the Office of Civil Rights and then as Chair of the Equal Employment Opportunity Commission (EEOC), I was President of the National Organization for Women. Over the past decade, Judge Thomas repeatedly expressed his views in numerous law review articles, speeches, and essays in newspapers. I carefully have reviewed his words and acts. And as a leader of the pre-eminent women's rights organization during his presence in government, I have done more than reviewed his words and acts. I have witnessed the devastating impact of his philosophy in action on the efforts to curb discrimination.

There is nothing in his record, performance, or writings -- not a shred of evidence -- that indicates any willingness to protect civil liberties or civil rights for women. Quite the contrary, his record is chilling; for the past decade, he has expressed the views of the farthest right fringe of the Republican Party.

Although I believe that Clarence Thomas poses a threat to constitutional rights in many areas, my testimony will focus on women's rights. At the outset, it is important to emphasize that the rights of more than half of the population must not be dismissed as merely the concerns of a special interest group. I hope that every member of this Committee, Democrat and Republican, liberal and conservative, agrees that an individual who is hostile to women's rights under the Constitution has no place on the United States Supreme Court. A person should not be confirmed for the Supreme Court unless he or she evidences commitment to certain basic constitutional values; reproductive privacy and gender equality must be among them.

Four years ago, this Committee rightly rejected Robert Bork for a seat on the Supreme Court because of his views, especially on privacy and gender discrimination. Clarence Thomas expresses almost identical opinions and frequently has aligned himself with Bork's judicial philosophy. In fact, Thomas' performance as Chair of the EEOC makes his hostility to civil rights even clearer and less abstract.

My testimony will focus on two areas of vital importance to women: reproductive privacy and employment discrimination. Clarence Thomas' views and performance on these issues make him unacceptable for a position on the Supreme Court which ultimately is responsible for protecting the civil rights of women and men.

A person is unsuitable for the Supreme Court unless he or she expresses a commitment to basic constitutional freedoms. Reproductive privacy is one of these guarantees. Indeed, reproductive freedoms are not simply one right among many. No civil liberty touches more people on a daily basis or more profoundly affects human lives than access to contraceptives and safe, legal abortions. Virtually all people -- at one time or another -- will use contraceptives. Studies show that forty-six percent of all women will have an abortion at some point in their lives. Without constitutional protection of reproductive freedom, women will die and suffer from unwanted pregnancies and illegal abortions.

Senators, each of you knows that the next person you confirm for the Supreme Court will be the decisive vote on reproductive freedoms for decades to come. Thus, a key question -- perhaps the crucial question: will Clarence Thomas follow precedents such as Griswold v. Connecticut, Eisenstadt v. Baird, and Roe v. Wade which establish the right of each person to choose whether to exercise fertility control?

Clarence Thomas' writings leave no doubt as to his views. In fact, no nominee for the Supreme Court -- not even Robert Bork -- has so consistently expressed opposition to reproductive freedoms as Clarence Thomas. In notes for a speech, titled "Notes on Original Intent," Clarence Thomas wrote: "Restricting birth control devices or information, and allowing, restricting, or (as Senator Kennedy put it) requiring abortions are all matters for a legislature to decide; judges should refrain from 'imposing their values' on public policy." (Undated manuscript, p. 2).

Thomas specifically discussed Griswold v. Connecticut and Roe v. Wade in a footnote in a law review article. (Thomas, "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth

Amendment," 12 *Harvard Journal of Law and Public Policy* 63, 63 n. 2 (1989)). After stating the holdings in Griswold and Roe, Thomas wrote: "I elaborate on my misgivings about activist use of the Ninth Amendment in [a chapter of a book published by the Cato Institute.]" In this chapter, Thomas defended Robert Bork's view that reproductive privacy is not worthy of constitutional protection. Thomas called Griswold an "invention" and argued that it is inappropriate for the Supreme Court to protect rights that are not expressly enumerated in the Constitution. (Thomas, "Civil Rights as Principle, Versus Civil Rights as an Interest," in Assessing the Reagan Years 398-99 (D. Boaz ed. 1988)).

Thomas' restrictive views about reproductive freedom were also reflected in the conclusions of a White House Working Group on the Family, of which Thomas was a member. The report sharply criticizes Roe v. Wade and several other Court rulings on privacy as "fatally flawed" decisions that should be "corrected" either by constitutional amendment or through the appointment of new judges and their confirmation to the Court." White House Working Group on the Family, The Family Preserving America's Future 12 (1986). The report also calls for the overruling of such basic decisions as Eisenstadt v. Baird, which held that every person has the right to purchase and use contraceptives; Moore v. City of East Cleveland, which held that a city cannot use a zoning ordinance to keep a grandmother from living with her grandchildren; and Planned Parenthood v. Danforth, which held that a state may not condition a married woman's abortion on permission from her husband.

There is nothing -- not a paragraph, not a sentence, not a word -- in Thomas' writings that indicates a willingness to protect reproductive freedoms and women's lives. To the contrary, Thomas may well be the first

Justice in American history even willing to prohibit states from allowing abortions. As you know, Clarence Thomas gave a speech in which he praised an article written by Lewis Lehrman as "a splendid example of natural law reasoning." Thomas, "Why Black Conservatives Should Look to Conservative Policies," Speech to the Heritage Foundation, June 18, 1987.

The central thesis of Lehrman's essay is that fetuses are human lives entitled to protection, from the moment of conception, by the Declaration of Independence and the Constitution. (Lehrman, "The Declaration of Independence and the Right to Life," American Spectator 21 (April 1987)). Lehrman called Roe a "spurious right born exclusively of judicial supremacy" and "a coup against the Constitution." Lehrman maintained that human life under the Declaration of Independence and the Constitution starts "at the very beginning of the child-to-be."

It is imperative to realize that Lehrman's views, endorsed by Thomas as "splendid," would justify more than overruling Roe v. Wade. Lehrman's argument is that the Constitution should protect fetuses from the moment of conception. From this perspective, abortion would be constitutionally prohibited. States would not even have the authority that existed before 1973 to allow abortion in their jurisdiction.

Simply stated, it is difficult to imagine a nominee with a more documented record of hostility to a basic civil liberty than Clarence Thomas' opposition to reproductive freedom. If a nominee for the Supreme Court expressed an unwillingness to protect freedom of speech, would not each and every one of you vote against confirmation? If a nominee expressed an unwillingness to safeguard free exercise of religion, would not each and every one of you vote against confirmation? Right now you are considering a nominee who has expressed an unwillingness to protect privacy. Surely,

if the word "liberty" in the Constitution means anything it must include privacy and the right of each person to choose whether to have a child.

This is not just about a legal abstraction. It is about women's lives. The confirmation of Clarence Thomas almost surely would create a majority on the Court to overrule Roe and condemn thousands of women to death and suffering. Because he has expressed unqualified hostility to a basic constitutional freedom, Clarence Thomas should be denied confirmation to the Supreme Court.

Independently, Clarence Thomas' views and record on the crucial issue of employment discrimination make him unsuitable for a seat on the high Court. Women in this society continue to face serious discriminatory treatment in the workplace. If a man and a woman hold the same job, the woman earns, on the average, 68 cents of each dollar paid to a man. Countless jobs remain closed to women. In many businesses and industries, discrimination against women remains the norm not the exception.

Clarence Thomas was Chair of the Equal Employment Opportunity Commission, the federal agency responsible for enforcing the laws protecting women from discrimination in the workplace. I ask you, when in Thomas' almost eight years at the agency, did he use his position to condemn discrimination against women and to fight in any meaningful way for gender equality in the workplace? As you read through Thomas' numerous speeches and articles, it is telling that he virtually never even mentions the civil rights of women.

The Equal Employment Opportunity Commission had a dismal record under Clarence Thomas' leadership in fighting discrimination. A study by the Women Employed Institute found that under Thomas'

leadership, 54 percent of all cases were found to lack cause, compared with 28.5 percent under the Carter EEOC in fiscal year 1980. The study also found that less than 14 percent of all new EEOC cases resulted in some type of settlement under Thomas, compared to settlements in 32 percent of the cases at the beginning of the Reagan administration. And these statistics do not even reflect the fact that Thomas' EEOC allowed 13,000 age discrimination claims, many by women, to lapse.

Thomas repeatedly has expressed hostility to the use of statistical evidence to prove employment discrimination. In Griggs v. Duke Power Company, in 1971, the Supreme Court held that evidence of disparate impact against women or racial minorities establishes a prima facie case of discrimination. Because it is so difficult to prove that an employer acted with a discriminatory intent, statistical proof is the basic and essential way of establishing a violation of Title VII of the 1964 Civil Rights Act.

But Clarence Thomas has strongly criticized allowing statistical evidence to prove discrimination. He stated that "we have, unfortunately, permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as 'adverse impact' and 'prima facie cases.'" Thomas, "The Equal Employment Opportunity Commission: Reflections on a New Philosophy," 15 *Stetson Law Review* 31, 35-6 (1985). Thomas, thus, would go even further than the current Supreme Court in preventing the use of statistical evidence to prove discrimination. The effect of Thomas' position would be effectively to drastically lessen Title VII's ban on employment discrimination.

In fact, as Chair of the EEOC, Thomas proposed to eliminate the use of statistical evidence to prove discrimination by the federal government. The Uniform Guidelines on Employee Selection Procedures were adopted in

1978 by the EEOC, the Department of Justice, the Labor Department and the Civil Service Commission. The Uniform Guidelines follow Griggs and allow statistical proof of employment discrimination. Thomas as Chair of the EEOC sought to revise these guidelines to eliminate such statistical evidence. If Thomas' position prevails on the Supreme Court, the fight against gender discrimination in employment would be immeasurably damaged.

Likewise, Thomas repeatedly has opposed the use of hiring timetables and goals which are an essential to gender equality in the workplace. The Supreme Court, in cases such as United Steel Workers v. Weber and Local 28 of the Sheet Metal Workers' International Association v. EEOC, approved hiring timetables and goals to remedy workplace inequality. But Thomas has strongly criticized these decisions. Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," at 395-96. In fact, in Fall 1985, the acting general counsel of the EEOC, under Thomas' leadership, ordered regional counsel not to enforce goals or timetables in consent decrees, nor to seek them in the future.

Countless other examples exist of the failure of Thomas' EEOC to enforce Title VII and other laws protecting women from discrimination. It must be emphasized that Thomas was not simply an employee in the agency; he was the Chair. He was not simply following preset policies; he was the architect of the Reagan Administration's effort to lessen civil rights protections. As Chair, he was charged with working to end discrimination against women. But he did nothing constructive in this regard.

At the very least, his poor performance at the EEOC should disqualify him for a "promotion" to the Supreme Court. Moreover, his documented

record of hostility to protecting the civil rights of women and minorities make him a grave threat to equal justice if he is confirmed.

Senators, I ask you to look past all of the rhetoric on both sides and focus on simple questions. Is there any place in Clarence Thomas' record where he has ever supported constitutional protection of reproductive freedoms? Is there anything in Clarence Thomas' record as Chair of EEOC to indicate that he would be a force for advancing civil rights and women's rights on the Supreme Court? Can you point to any evidence -- any speech, any article, any judicial opinion -- where Clarence Thomas has expressed a meaningful commitment to reproductive privacy or civil rights for women?

The rights of millions of women rest on this nomination. I urge you to vote against Clarence Thomas' confirmation.



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**TESTIMONY**

**OF**

**HONORABLE THOMAS J. CHARRON**  
**DISTRICT ATTORNEY**  
**COBB JUDICIAL CIRCUIT (MARIETTA), GEORGIA**  
**AND**  
**PRESIDENT**  
**NATIONAL DISTRICT ATTORNEYS ASSOCIATION**

**BEFORE THE**

**SENATE JUDICIARY COMMITTEE**

**CONCERNING**

**THE APPOINTMENT OF JUDGE CLARENCE THOMAS**  
**TO THE SUPREME COURT**

**ON**

**SEPTEMBER 17, 1991**

September 17, 1991

Mr. Chairman, members of the Committee, I appreciate the opportunity to testify here today in support of President Bush's nomination of Judge Clarence Thomas to the U. S. Supreme Court.

I am Thomas J. Charron, elected district attorney of the Cobb Judicial Circuit which includes Marietta, Georgia. I am also the President of the National District Attorneys Association.

Judge Clarence Thomas has participated in more than 150 cases since joining the D.C. Circuit Court of Appeals and is the author of 17 majority opinions; he has authored 2 dissents and 2 concurrences. Seven of the 17 majority opinions related to drug convictions. Judge Thomas' criminal law opinions reflect scholarship, an appropriate adherence to the rule of law, and judicial restraint.

But these hearings have not focused on Judge Thomas' criminal law rulings or even his extrajudicial statements relative to the criminal law. Other issues are paramount. Political issues, religious issues, ethical issues, and moral issues. In the context of Judge Thomas' confirmation hearing, "safe streets" is not foremost in the minds of members of this Committee nor, frankly, foremost in the minds of the public at large. But, I offer a word on the subject, nevertheless:

As a D.C. Circuit judge, Clarence Thomas has demonstrated a great concern for the safety of an innocent public. He has closely followed the federal rules of evidence and criminal procedure as enacted by the Congress of the United States. He has given great deference to the fact-finding process of the lower court, leaving to the jury its proper role in assessing the sufficiency of the evidence. He has avoided basing conclusions on personal moral preferences rather than legal reasoning. He abhors the application of judicial fiat to achieve ends that are political and properly left to legislative bodies. We can ask no more than this. If he has conducted himself in this fashion as a judge on the D.C. Circuit Court of Appeals I think we can assume that he will continue to do so as a member of the Supreme Court.

The Committee has delved quite extensively into Judge Thomas' "natural law" philosophy. He has stated that his foray into this murky and esoteric area was for the primary purpose of showing the fundamental injustice of discrimination, an attempt to plumb "the philosophy of the founders of our country and the drafters of our Constitution." Judge Thomas is an honorable man and I am satisfied with his repeated assurances that "natural law" should not be used in constitutional adjudication; that his use of that concept calls for judicial restraint and does not permit a judge to insert his own notion of right and wrong into a case or on that basis strike down legislation passed by Congress. This is important to all of us since Judge Thomas' pre-eminent task as a Supreme Court justice will be constitutional and statutory interpretation.

Relative to the interpretation of statutes passed by Congress, we can, I believe, gain some insight by looking to Judge Thomas' ruling in Otis Elevator v. Secretary of Labor in which he

looked closely at the legislative history of the act and declared his belief in the principle that "a statute should be construed so that effect is given to all its provisions." Although this is only one case, the position taken in that case certainly indicates that he would give great weight to Congressional intent.

We believe that Judge Thomas, as a member of the Supreme Court, will be a staunch protector of individual rights guaranteed by our Constitution, faithfully protecting the progress so hard won by minorities.

Judge Thomas is an unpretentious and intellectually honest man who has chosen a philosophical path which requires independence, courage, and commitment to advancing the fundamental and constitutional rights of all Americans. He will make a great Supreme Court Justice and we urge this Committee and the Senate to confirm his nomination to the Court with as little delay as possible.



**Opposition to the Nomination of  
Clarence Thomas to the  
United States Supreme Court**

**Testimony Submitted to the  
Senate Judiciary Committee**

**September 19, 1991**

**by**

**Anne L. Bryant, Ed.D.  
Executive Director**

**American Association of University Women  
1111 16th Street, N.W.  
Washington, DC 20036**

**202/785-7788**

I am Anne Bryant, executive director of the American Association of University Women (AAUW). It is a privilege to testify on behalf of AAUW's 135,000 members: women and men who are committed to equity and education for women and girls.

On behalf of our membership, I urge the Judiciary Committee to reject Clarence Thomas' nomination to the United States Supreme Court. In his testimony before this Committee, Judge Thomas has suggested that statements he made and views he expressed prior to 1990 are not necessarily positions he would hold as a Supreme Court Justice. AAUW believes that the Senate has a responsibility to consider the public record of a Supreme Court nominee in assessing a nomination. We believe that Judge Thomas' record as chair of the Equal Employment Opportunity Commission and his tenure as Assistant Secretary for Civil Rights in the Education Department raise grave concerns about his commitment to equal opportunity and provide examples of his failure to enforce federal law.

AAUW opposes Clarence Thomas' nomination for five reasons.

First, we believe that in his positions at the EEOC and the Department of Education, Judge Thomas showed a blatant disregard for the law of the land. As Chair of the EEOC, he allowed more than 13,000 age discrimination complaints to lapse by failing to investigate them within the legal time limit. Congress had to pass the Age Discrimination Claims Assistance Act to assist those

individuals whose complaints of age discrimination had been ignored by the EEOC.

Although Judge Thomas served in the Education Department's Office of Civil Rights for less than a year, a similar pattern of failure to enforce the law was present there. In 1981, the Women's Equity Action League filed suit against the Department charging improper enforcement of Title IX of the Education Amendments of 1972. In 1982, a District Court judge ruled that the Department was both misinterpreting the Title IX regulations and providing inadequate remedies when a Title IX violation was determined.

This pattern of failure to enforce the law casts grave doubts on Judge Thomas' judicial temperament. We are particularly disturbed that he has been unwilling to enforce key federal laws intended to guarantee individual rights in employment and education.

Second, AAUW opposes Judge Thomas' nomination because of his record of vocal opposition to efforts to ensure equal opportunity in the workplace. While heading the EEOC, he undermined the effectiveness and credibility of the agency by publicly expressing his personal opposition to affirmative action programs, even those ordered as remedies following a finding of discrimination.

Judge Thomas was also vocal about his opposition to Title VII class action suits, despite Congress' mandate that his agency

initiate such cases. His negative comments about a class action suit filed by the EEOC against Sears led attorneys to explore calling him as a defense witness. By calling into question the validity of lawsuits involving claims of disparate impact, Judge Thomas contravened both the intent of Congress in passing Title VII and the Supreme Court's ruling in the 1971 Griggs case.

In 1985, the EEOC ruled that federal law does not require equal pay for jobs of comparable value, and the agency stopped investigating complaints involving pay equity claims. This ruling contradicted the Supreme Court's 1981 decision in the Gunther case. Again, Judge Thomas directed EEOC activities based on his own beliefs, rather than abiding by relevant federal law.

Third, AAUW is distressed by Judge Thomas' apparent hostility to the constitutional right to privacy as outlined in Griswold v. Connecticut. In an article published by the Cato Institute in Assessing the Reagan Years, Judge Thomas stated that the unenumerated rights specified in the Ninth Amendment were not intended to be cited by the Supreme Court in overturning laws.

By stating his opposition to the constitutional basis of the fundamental right to privacy, Judge Thomas has given evidence of his willingness to restrict individual liberties, including the right to reproductive choice.

Fourth, Judge Thomas' support of a "natural law" concept is deeply disturbing to AAUW. In speeches and articles, Thomas has

maintained that judges should be guided by a "natural law" philosophy, the belief that the "inalienable rights" cited in the Declaration of Independence are a higher authority than the U.S. Constitution.

Thomas has said he believes in the existence of moral norms derived from "nature's god," and that those norms can be used to critique and even invalidate civil law. Thomas' statements about "natural law" raise serious doubts about his commitment to maintain separation of church and state.

Finally, AAUW believes that the Judiciary Committee should not confirm Clarence Thomas' nomination to the Supreme Court because of the critical need for judicial balance on the most important court in our nation. The recent appointments of Anthony Kennedy, Antonin Scalia, and David Souter solidified a strong conservative shift in the Supreme Court. With the resignation of Justice Thurgood Marshall, the Court swung dangerously out of balance.

Confirmation of Clarence Thomas, a probable sixth conservative vote on the Court, threatens to unleash the sweeping change we have glimpsed in the Rehnquist Court. Replacing Justice Marshall with a judicial conservative like Clarence Thomas will effectively eliminate the Supreme Court as an instrument for ensuring continued progress and protection of individual rights for decades to come.

The American Association of University Women believes that the Senate has a responsibility to ensure an ideologically balanced Supreme Court and must, therefore, defeat the Thomas nomination.

On behalf of AAUW, I thank you for the opportunity to testify.



**National Organization for Women, Inc.**

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TESTIMONY OF  
MOLLY YARD  
President, National Organization for Women, -  
Before the Judiciary Committee  
of the United States Senate  
regarding the  
Confirmation of Clarence Thomas  
September 20, 1991

My name is Molly Yard. I am the president of the National Organization for Women. I am pleased to be here today to testify regarding the nomination of Clarence Thomas to the United States Supreme Court.

You may be aware that I am recovering from a stroke that I suffered several months ago. I am still working on physical and speech therapy. Despite that, I was absolutely determined to present this testimony. I felt that I must make yet one more appeal to you to stand up for the rights of women and other oppressed groups.

NOW is adamantly opposed to the nomination of Clarence Thomas. Mr. Thomas has demonstrated none of the qualities necessary for a member of this nation's highest court. While a Supreme Court Justice must be compassionate, Mr. Thomas has shown scorn for the oppressed. While a Justice must have respect for the law, Mr. Thomas has demonstrated a willingness to promote his conservative personal agenda in defiance of the law of the land. While a Justice should be forthright, Mr. Thomas has been evasive. Clarence Thomas has simply not shown himself to be worthy of a seat on the Supreme Court.

Mr. Thomas seems to be doing his best to imitate the Teflon candidacy of David Souter. Perhaps he feels that a blank slate is an unimpeachable one. Yet

how can the good of this country possibly be served by a man who has spent weeks backing away from his own record?

Perhaps the most blatant example of Mr. Thomas' attempt to rewrite history is his claim that we should not take seriously his public praise for Louis Lehrman's antiabortion polemic. Mr. Thomas now would have us believe that he did not agree with the piece but was only citing to it to gain the support of his conservative audience. Frankly, I don't believe that story and neither should you. But even if I did, Mr. Thomas' defense -- that he says things that he doesn't believe in order to win an audience -- does not inspire confidence in the statements he has made before this committee and certainly does not make me secure that he will be a strong and zealous guardian of our constitutional rights. Similarly, even if we were to accept Mr. Thomas' astonishing claim that he has never given much thought to Roe v. Wade, this lack of interest in one of the crucial civil rights issues of the last 20 years would show Mr. Thomas to be so disengaged from modern legal and social debate as to disqualify him from sitting on the Supreme Court.

In fact, Clarence Thomas is not the enigma he would like to be. Both his words and his actions show him to be cold and callous. Mr. Thomas compiled a record

of neglect at the EEOC, particularly with regard to women's rights. This man insulted women who have suffered discrimination in employment by calling their legitimate complaints "clichés." He said that women avoid professions like the practice of medicine because it interferes with our roles as wives and mothers. This type of medieval claptrap would doom any politician running for electoral office. How, then, can it be considered acceptable for a Supreme Court nominee? .. .

It is always easy to cut through people's pretensions by looking at how they treat their families. Many saints have been unmasked as sinners in the privacy of their homes. Clarence Thomas used his own sister, Emma Mae Martin, as an example to denigrate people on welfare. Yet Mr. Thomas' sister overcame a life of poverty to graduate high school and enter the workforce. After she was deserted by her husband, she supported her young children by working at two minimum wage jobs. She was indeed on welfare during a period when she was forced to leave her jobs to take care of her (and Mr. Thomas') aunt, who had had a stroke. She now works as a cook on a shift that starts at 3 o'clock in the morning. As is too often the case, it appears that in Mr. Thomas' family the male child was given the opportunity to get a college

education and a professional career, while the girl accepted the responsibility of caring for the family. To me, Emma Mae Martin sounds like a brave, strong woman, committed to her family and fighting to do the best she can. Yet Clarence Thomas sees her as dishonorable.

Mr. Thomas' cruel remarks would be bad enough when said of a total stranger. That he would use his own sister as the butt of such an insult is shocking. Mr. Thomas has been nominated for a position that requires, above all, sensitivity and concern about all those who come before the courts seeking justice. Rather than demonstrating those qualities, he has instead shown himself to be cynical and cold.

This nomination is particularly poignant for me because of the man that Clarence Thomas has been nominated to replace. Had Thurgood Marshall never spent one day on the bench, his brilliant career as an activist civil rights lawyer would have guaranteed him a place in history and in the hearts of all people who believe in equality and justice. Yet Thurgood Marshall went on to champion the rights of the oppressed from the Supreme Court, tirelessly fighting to uphold the very principles that Clarence Thomas sees as outmoded or unnecessary. While nothing can extinguish the light that Thurgood Marshall

lit, it would be sad to replace him with a man who is committed to dousing the torch that Justice Marshall carried so proudly.

It has become increasingly difficult to come here on each succeeding Supreme Court nomination and beg for women's lives, only to have our pleas ignored. We urged you, in the strongest terms, to understand that the confirmation of Justices Kennedy and Scalia would lead inevitably to the erosion of women's right to safe, legal abortion. Those predictions proved true two years ago as the court severely undercut Roe v. Wade in the Webster case, and went on a year later in the Akron and Hodgson decisions to take away the rights of young women to control their bodies. We warned that David Souter, silent though he was on many significant issues, would be yet another conservative, anti-abortion vote. As we feared, Justice Souter was an instrumental part of the majority last term, when the Court took the incredible step of holding that women had no right to be informed by their physicians and other medical personnel of even the fact that abortion exists.

Senators, many of you and your colleagues in the House have spent time in recent sessions trying to restore the civil rights that the Court has undercut,

fighting to reverse the gag rule that the Court has upheld, and working to guarantee the right to abortion that the Court has imperiled. Yet had you held fast against the unsuitable nominees put before you by the Reagan-Bush administration, these efforts would not have been necessary. Your constitutional role is not to be a rubber stamp for the President. Instead, you must look into your hearts and judge what is best for this country before you advise and consent on nominations. It is not just your prerogative but your duty to protect the fundamental constitutional rights of all of the people. How can you in good conscience consent to an increasingly unbalanced court that represents one judicial philosophy, a philosophy that ignores the needs of the majority of this country?

The conservative tide has swept over the Supreme Court. With each Reagan-Bush nominee that the Senate confirms, you entrench still more firmly a Supreme Court that is at best indifferent and at worst hostile to the rights of women, people of color, lesbians and gays, the handicapped, the elderly, the poor -- all those who most need protection from the nation's highest court. You still have some ability to stem that tide, to give the dispossessed and disenfranchised a faint glimmer of

hope that someone cares about them, that the entire government of the United States is not a cynical enterprise run by the privileged for the privileged. I urge you, once again, to stand up for equality, for justice, and for compassion. Vote against the confirmation of Clarence Thomas.

The CHAIRMAN. Mr. Hayes.

**STATEMENTS OF A PANEL CONSISTING OF ED HAYES, COUNCIL OF 100; AND DAVID ZWIEBEL, AGUDATH ISRAEL OF AMERICA**

Mr. HAYES. Good evening, Mr. Chairman.

The CHAIRMAN. Good evening.

Mr. HAYES. Members of the committee.

My name is Edward Hayes, Jr. I am an attorney in private practice at Baker & Hostetler in Washington, DC, and I appear before this evening on behalf of the Council of 100, a national organization of black Republicans.

The primary goal of the council is to stimulate and foster participation by black Americans in the U.S. political process. The council has appeared before the Congress on prior occasions to support candidates and to share its views on important pending legislation.

We are delighted to appear today to support the candidacy of Judge Clarence Thomas as a Justice on the Supreme Court. Indeed, when Justice Marshall announced his resignation from the Court, the council wrote to President Bush recommending the consideration of Judge Thomas. We made this recommendation because we know Judge Thomas as an individual, and because we have admired his selfless contributions to our country as a government official in several significant capacities.

Having learned even more about him through the strenuous confirmation process, we continue to believe that he should be confirmed for the Supreme Court.

Because my time before you is brief and the hour is late, I would like to focus on only a few key reasons for our support of Judge Thomas.

The first reason is the wealth of experience that Judge Thomas has already achieved. Having worked for Senator Danforth, having served in senior positions in the administration, and serving now as a member of the U.S. Court of Appeals, he has had exposure to all branches of government. In addition, having worked as an attorney for Monsanto Corp., he could be the only Justice to have worked in the corporation counsel office of a major company.

This opportunity to observe the operation of both government and business, and to address public concerns, gives Judge Thomas a perspective that few Supreme Court jurists, past or present, could match.

Clearly, the Supreme Court is not like any other institution, and therefore more scrutiny is required. Yet, it must be remembered that you do not have a blank slate before you. The positions for which the Senate has already appointed him have provided Judge Thomas the broad experience that qualifies him today. The Senate has, on other occasions, passed on his character after examination. The strength of his character is no less today. And in the end, when we judge nominees, the nature of one's character should be the bottom-line criterion.

A second reason for the council's support is that Judge Thomas has the honed ability and the independence of mind, desirable of a jurist. As has been demonstrated in this hearing, Judge Thomas' independence of mind has not come without a great deal of person-

al cost to him and to his family. By daring to challenge conventional thinking, he has been ostracized by certain of his peers, and personally attacked by spokespersons in the black community.

Those who think that his questioning approach to examining policies that have become sacred cows is a matter of convenience, in order to endear himself to the Republican Party, would do well to consider the testimony offered on September 16, by Sister Mary Reidy, who taught Judge Thomas when he was in the eighth grade. According to Sister Mary, even at a young age, Clarence Thomas did not uncritically accept orthodoxy.

It should be clear to all by now, that Clarence Thomas is first and foremost an independent thinker. This is what we should require of our jurists. They must all be bright, sensitive, fair, and grounded in the Constitution as the law of the land, but they must also be able to analyze, independently, the law before them, and to apply it with an open mind, without being beholden to a particular philosophy, ideology, or patron.

Finally, we applaud the nomination of Clarence Thomas because it has brought to the fore the diversity of views that are so often overlooked within the black community. Certainly, Judge Thomas has been controversial, and rightly so. Anyone who dares to march to a different drummer will be controversial and arouse passion. However, it must not be ignored that despite the visibility of certain persons within the black community that oppose Judge Thomas, there is also a great deal of quiet support for him, as indicated by recent polls.

In conclusion, the Council of 100 believes that if the finest steel is tempered in the hottest fires, then Clarence Thomas is a man of fine steel indeed. He has an open legal mind, he is fair and caring, and he has a commitment to public service. Moreover, he has the moral character, the breadth of experience, and a due regard for cautious construction of constitutional issues needed for a Justice.

Thank you for permitting me, on behalf of the Council of 100, to address the committee in support of the nomination of Clarence Thomas.

[The prepared statement of Mr. Hayes follows:]

September 19, 1991

Testimony of Edward Hayes, Jr., Esquire, on behalf of the Council of 100, an Organization of Black Republicans, before the Senate Judiciary Committee upon the Nomination of Clarence Thomas to the Supreme Court.

Good Morning, Mr. Chairman, and members of the Senate Judiciary Committee. My name is Edward Hayes, Jr. I am an attorney in private practice at Baker & Hostetler in Washington, D.C., and I appear before you this morning on behalf of the Council of 100, a national organization of black Republicans. The primary goal of the Council is to stimulate the participation by black Americans in the U.S. political process through candidacies for elected positions, through involvement at the local level, and through airing views on key issues.

The Council has appeared before the Congress on prior occasions to support candidates and to share its views on important pending legislation. We are delighted to appear today to support the candidacy of Judge Clarence Thomas as a Justice on the Supreme Court. Indeed, when Justice Marshall first announced his resignation from the Court, the Council wrote to President Bush recommending the consideration of Judge Thomas. We made this recommendation because we know Judge Thomas as an individual and because we have admired his selfless contributions to our country as a government official in several significant capacities. Having learned even more about him through the strenuous confirmation

process, we continue to believe that he should be confirmed for the Supreme Court.

Because my time before you is brief, I would like to focus on only a few key reasons for our support of Judge Thomas.

The first reason is the wealth of experience that Judge Thomas has already achieved. Having worked for Senator Danforth, having served in senior positions in the Administration, and serving now as a member of the U.S. Court of Appeals, he has had exposure to all branches of government. In addition, having worked as an attorney for Monsanto Corporation, he could be the only justice to have worked in the corporation counsel office of a major company. This opportunity to observe the operation of both government and business, and to address public concerns at different levels, gives Judge Thomas a perspective that few Supreme Court Jurists past or present could match.

Indeed, this Senate has already confirmed Judge Thomas on four separate occasions: as Assistant Secretary for Civil Rights at the Department of Education in 1981, twice as Chairman of the EEOC in 1982 and 1986, and most recently as U.S. Court of Appeals Judge for the District of Columbia in 1990.

Clearly the Supreme Court is not like any other institution and therefore more scrutiny is required. Yet it must be remembered that you do not have a blank slate before you. The positions for which the Senate has already appointed him have provided Judge Thomas the broad experience that qualifies him today. The Senate has on other occasions passed on his character after examination. The strength of his character is no less today, and in the end, when we judge nominees, the nature of one's character should be the bottom line criterium.

A second reason for the Council's support is that Judge Thomas has the honed ability and the independence of mind desirable of a jurist. As has been demonstrated in this hearing, Judge Thomas' independence of mind has not come without a great deal of personal cost to him and to his family. By daring to challenge conventional thinking, he has been ostracized by certain of his peers and personally attacked by spokespersons in the black community. Those who think that his questioning approach to examining policies that have become "sacred cows" is a matter of convenience, in order to endear himself to the Republican Party, would do well to consider the testimony offered on September 16th by Sister Mary Virgilius Reidy who taught Judge Thomas when he was in the eighth grade. According to Sister Mary, even at a young age Clarence Thomas did not uncritically accept orthodoxy. It should be clear to all by now that Clarence Thomas is first and foremost an independent thinker. This is what we should require of our jurists. They must

all be bright, sensitive, fair, and grounded in the Constitution as the law of the land. But they must also be able to analyze independently the law before them and to apply it with an open mind without being beholden to a particular philosophy, ideology, or patron.

Finally, we applaud the nomination of Clarence Thomas because it has brought to the fore the diversity of views that are so often overlooked within the black community. Certainly Judge Thomas has been controversial and rightly so. Anyone who dares to march to a different drummer will be controversial and arouse passion. However, it must not be ignored that despite the visibility of certain spokespersons within the black community that oppose Judge Thomas, there is also a great deal of quiet support for him. Indeed, recent polls by both ABC and Jet magazine indicate that 60% of black Americans support the nomination of Judge Thomas. In this regard, the leaders may have fallen behind the people.

In conclusion, the Council of 100 believes that if the finest steel is tempered in the hottest fires, then Clarence Thomas is a man of fine steel indeed. He has an open legal mind, he is fair and caring, and he has a commitment to public service. Moreover, he has the moral character, the breadth of experience, and a due regard for cautious construction of constitutional issues needed for a Justice.

Thank you for permitting me, on behalf of the Council of 100, to address the Committee in support of the nomination of Clarence Thomas to become a Supreme Court Justice.

Edward Hayes, Jr., Esq.  
Immediate Past Chairman  
Council of 100, an Organization of  
Black Republicans

The CHAIRMAN. Thank you, Mr. Hayes—particularly for your timing. Thank you very much. Very good statement.

Mr. Zwiebel.

#### STATEMENT OF DAVID ZWIEBEL

Mr. ZWIEBEL. Thank you very much.

Mr. Chairman and distinguished members of the panel, I am David Zwiebel, and I am the general counsel and director of government affairs for Agudath Israel of America. Agudath Israel is the national's largest grassroots Orthodox Jewish movement, and I am here to convey our organization's support for the nomination of Clarence Thomas to the U.S. Supreme Court.

We support Judge Thomas for a number of reasons. We believe that his record and his background demonstrate integrity, intelligence, and independence. But, in light of the lateness of the hour, I think I would like to focus in on one very specific issue—an issue that has not gathered all that much attention during these hearings.

It is an issue of extraordinary importance to our own constituency and, we believe, of extraordinary importance to freedom-loving Americans throughout this country.

The issue, specifically, is the accommodation of the religious rights of minority religionists in the work force—a specific issue that Judge Thomas compiled a very distinguished record on during his years as Chairman of the EEOC.

In 1985, the U.S. Supreme Court ruled in a case called *Estate of Thornton v. Caldor*, in which a Connecticut statute, which was defended by, at that time, the attorney general of the State of Connecticut, a man by the name of Joseph Lieberman, was held unconstitutional in the U.S. Supreme Court.

The statute required employers to accommodate the sabbath observance requirements of their employees. Said the U.S. Supreme Court, this violated the establishment clause of the first amendment—there shall be no law establishing religion.

Because this particular accommodation requirement was absolute—it allowed for no exceptions whatsoever—the U.S. Supreme Court said that constituted an endorsement of religion in violation of the first amendment.

Well, after the Supreme Court issued that ruling, our phones and phones of many Jewish organizations around this country started ringing off the hook. Employees were calling us, telling us that their employers were telling them that they could no longer leave early on Friday afternoons, when sundown was early, in order to observe their sabbath, or that they could no longer take off for certain religious holidays.

And we said that that was an incorrect interpretation of this ruling. The Connecticut statute was *sui generis*, it stood on its own, it was different than other statutes. But, nonetheless, there was this very serious problem, based on a misperception of the U.S. Supreme Court ruling.

Among other things, at that time, we contacted the EEOC. And, at that time, Chairman Thomas took a very, very specific and great interest in this issue, and shortly thereafter issued a policy memo-

randum clarifying that what the Supreme Court held in the *Caldor* case applied specifically and only to the statute in Connecticut, because the statute brooked for no exceptions whatsoever. It was absolute.

Title VII, on the other hand, which mandates reasonable accommodation, and allows an employer to make a case of undue hardship, said Judge Thomas—at that time, Chairman Thomas—was in full force and effect. And that requirement of reasonable accommodation was the law of the land.

Armed with that memorandum, we were able to stop the problem that many of the employees were facing at that time.

An almost identical scenario played out 1 year later, when the U.S. Supreme Court issued a ruling in a case called *Goldman v. Weinberger*. Goldman was Capt. Simcha Goldman in the U.S. Air Force, an Orthodox Jew, who would always wear a yarmulke, or head covering, as a matter of religious faith. There was an Air Force regulation which said no head coverings may be worn while indoors.

Captain Goldman said, well the first amendment free exercise clause protects my right to wear this head covering. Said the U.S. Supreme Court, by a vote of 5 to 4, no it does not. The military is a very special setting, and the requirements of discipline and uniformity in the military would override Captain Goldman's first amendment free exercise rights.

Well, again the phones started ringing off the hook, and employees who wore yarmulkes on the job were calling us and telling us that their rights were being threatened because the employers were telling them the Supreme Court had held that yarmulkes were no longer permitted, or at least they could insist that there be no longer any wearing of yarmulkes on the job.

Again, Chairman Thomas was contacted, and issued a policy memorandum stating clearly that *Goldman v. Weinberger*, the Supreme Court decision, related specifically to the context of the military, and had no application to the context of private employment, where title VII's protections applied with full force and effect.

What do these policy memos and actions of Chairman Thomas, now Judge Thomas—hopefully, soon to be Justice Thomas—what do they tell us about the man? I think two things, one very specific and one more general.

The specific point is that, with respect to the question of respecting religious freedom and the rights of religious minorities, I think that we can assume that Judge Thomas is sensitive to those concerns, and will, in fact, be a champion of religious freedom.

This is no small issue, particularly in light of the Supreme Court's holding a year ago, in a case called *Employment Division v. Smith*—Senator Biden, I know you have introduced a bill in the Senate that would overturn the effect of that decision. But, a 5-to-4 ruling of the Supreme Court which held that the first amendment's free protection rights simply do not cover statutes that have only an incidental impact on the practice of religion, which curtailed the free exercise of religion enormously.

And this is a very, very serious issue as we enter the 1990's and beyond, and having a voice like Judge Thomas' on the Supreme

Court, we are hopeful, will, in fact, restore to some extent, the rightful place of the first amendment's free exercise protections.

The CHAIRMAN. I asked him that question, and he refused to tell me whether he agreed with O'Connor or Scalia, when everybody else we have asked that question to had no trouble answering the question.

I just thought you might want to know that.

Mr. ZWIEBEL. I understand that, and I am aware of that, but, again, what I would suggest is that this particular aspect of his record suggests to us, despite his consistent performance at these hearings of not answering all of those questions quite as openly as we had hoped he might—it suggests to us at least that the man is sensitive to religious liberty issues and the rights of religious minorities.

And when you look for clues in a record of that sort, when he has not issued any judicial rulings on the subject, where he has not answered the specific question put to him during the hearings, and you look for clues in the record, I think this is very telling.

And the second, more general, point that I draw from this particular episode, or series of episodes, is that he is not an ivory tower jurist. He is not somebody who does not understand the impact—the broad impact—that Supreme Court rulings can have on Americans all across the country, in the everyday lives of Americans, even in contexts in which the Court has never issued the ruling, such as in the *Goldman* case, and indeed, also with respect to the *Caldor* case.

And I think that that is a quality that is of extraordinary importance in a jurist, and particularly a jurist who is sitting on the highest court of the land.

Let me just conclude by stating that our review of the record persuades us at Agudath Israel of America that Judge Thomas is highly qualified to sit on the highest court of this land, and we believe he deserves confirmation.

Thank you.

[The prepared statement of Mr. Zwiebel follows:]



David Zwiebel, Esq.  
 Director of Government Affairs  
 General Counsel

September 19, 1991

**TESTIMONY OF DAVID ZWIEBEL, ESQ., DIRECTOR OF GOVERNMENT AFFAIRS  
 AND GENERAL COUNSEL OF AGUDATH ISRAEL OF AMERICA,  
 IN SUPPORT OF THE NOMINATION OF  
 JUDGE CLARENCE THOMAS TO THE UNITED STATES SUPREME COURT**

Mr. Chairman and distinguished members of the Senate Judiciary Committee:

My name is David Zwiebel. I am the director of government affairs and general counsel for Agudath Israel of America, the nation's largest grassroots membership organization of Orthodox Jews, and I am here to convey Agudath Israel's support of the nomination of Judge Clarence Thomas to the United States Supreme Court.

Judge Thomas' credentials are most impressive, especially when one considers how much he has accomplished in such a relatively short span of time. By dint of his long and in many ways distinguished service as chairman of the Equal Employment Opportunity Commission, Judge Thomas gained outstanding experience in the field of civil rights -- a vital area of the Supreme Court's agenda. He is familiar with the legislative process, having served as a legislative aide to Senator John Danforth. He would bring to the high court personal knowledge of economic hardship and racial discrimination, having overcome his own circumstances of abject poverty through an unwavering commitment to hard work and personal excellence.

In addition, Judge Thomas has demonstrated that he is a man of intellectual independence. Most notable in this regard is his forthright rejection of the policies of racial preference espoused by most American black leaders as

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the best means of improving the plight of impoverished minorities in this country. Whether one agrees or disagrees with Judge Thomas' views on such controversial issues as quotas, race-norming and equal opportunity -- for the record, Agudath Israel happens to agree with those views -- it is impossible not to admire his courageous willingness to speak the truth as he sees it. That attribute of independence, perhaps more than any other, persuades Agudath Israel that Judge Thomas will serve with distinction on the Supreme Court.

Yet another noteworthy attribute Agudath Israel believes Judge Thomas possesses is a clear yet compassionate understanding of how Supreme Court rulings, issued from the proverbial ivory towers of the Justices' chambers, affect real people in their daily lives across the length and breadth of this great nation. To illustrate this point, I would like to share with you a striking aspect of Judge Thomas' record as EEOC chairman, one which to the best of my knowledge has not received attention during these hearings. I refer specifically to an issue in which Agudath Israel and its constituents have a great stake: the legal obligation to accommodate the rights of religious minorities in the workplace.

In March 1986, by a vote of 5-4, the Supreme Court ruled that the First Amendment's guarantee of the free exercise of religion did not protect Air Force Captain S. Simcha Goldman's right to wear a yarmulke (an unobtrusive head covering worn by observant Jews) in the face of an Air Force regulation that proscribed the wearing of headgear indoors. Goldman v. Weinberger, 475 U.S. 503 (1986). In the weeks thereafter, and no doubt as a direct outgrowth

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of the publicity generated by the Court's ruling, Agudath Israel and several other Jewish groups received a number of phone calls from observant Jewish employees who were being told by their private sector employers that they could no longer wear their yarmulkes on the job. Among various other steps taken at that time, we contacted the EEOC to inform the agency of this troubling development. Judge Thomas -- then Chairman Thomas -- took a personal interest in the matter and issued an EEOC policy memorandum stating clearly that the holding in the Goldman case was limited to the specific context of the military; and that the religious accommodation provisions governing private employment, embodied in Title VII and its accompanying regulations, remained in full force and effect. Armed with this memo, we were quickly able to help resolve the problems that had arisen.

In issuing a policy statement to dispel some of the confusion surrounding the Supreme Court's 1986 Goldman decision, Judge Thomas followed the course he had taken a year earlier when similar confusion surrounded the Court's decision in Estate of Thornton v. Caldor, 472 U.S. 703 (1985). In that case, the high court ruled unconstitutional a Connecticut statute requiring employers, absolutely and without qualification, to allow their employees time off for Sabbath observance. In the aftermath of the Court's ruling, Judge [Chairman] Thomas issued an EEOC memorandum making clear that the discredited Connecticut statute was not to be confused with less absolute statutes requiring reasonable accommodation of an employee's Sabbath observances; and that the Sabbath observance provisions of Title VII continued to retain their vitality.

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Thus, as chairman of the EEOC, Judge Thomas twice recognized that the rights of religious minorities in the workforce were being threatened as a result of inaccurate public perceptions surrounding rulings of the Supreme Court, and twice took the initiative to dispel the misperceptions and protect religious freedom. This, we submit, demonstrates not only Judge Thomas' commitment to the principle of religious liberty -- itself no small cause for celebration, especially in the aftermath of the Supreme Court's ruling last year in Employment Division v. Smith, 110 S.Ct. 1595 (1990), which severely curtailed First Amendment protection for the free exercise of religion -- but also his sensitivity to the potential power of a Supreme Court ruling and its ability profoundly to affect the everyday lives of Americans in contexts far-removed from the one in which the ruling is issued. That sensitivity is an essential attribute of good judging, especially at the Supreme Court level, and will stand Judge Thomas in good stead if he is confirmed and assumes his seat on the high court.

In sum, Agudath Israel of America's review of Judge Thomas' record and resume leads us to conclude that he possesses the basic qualities of an outstanding jurist, perhaps even in abundance. He deserves this Committee's positive recommendation and eventual confirmation by the full Senate.

Thank you very much.

The CHAIRMAN. Thank you very much.

Now, this is a heck of a thing to do to Mr. Palmer and Ms. Alvarez, but there is a vote on and we have about 5 minutes left in which to vote.

There are going to be three votes in a row, which means that the earliest that we will be able to get back here would be about 20 minutes—25 minutes, before we can come back.

Which means that you are in a tough situation, and beyond our control, quite frankly. And I would—I am not encouraging you to do this, but I give you the option to do this, in light of the hour.

You can wait, and I will come back at 10 o'clock, or earlier, depending on when the last vote is. I will come straight back and reopen the hearing, or you can submit your testimony in writing.

I am not encouraging you to do the latter, but I want to accommodate your interests. I am here for the duration, and I am anxious to hear from you, but it is up to you, because I know you did not anticipate, I suspect, that you would be on at 10 at night—not 9:30, let alone 10.

Would you have a preference of what you would like to do, Mr. Palmer?

Mr. PALMER. Yes, I do, Mr. Chairman. I have traveled some 1,500 miles.

The CHAIRMAN. It is no problem for me to travel back three blocks to come back. I don't have any problem.

Mr. PALMER. I look forward to the opportunity to testify.

The CHAIRMAN. All right. We will recess until 10 p.m.

Mr. PALMER. Thank you.

[Recess.]

The CHAIRMAN. The hearing will come to order. I was given a suggestion by Ms. Alvarez which seems simple and it's brilliant. That is, what we will do is excuse the two witnesses who have already testified. Any questions this committee has we'll submit to them in writing, and we will invite Mr. Palmer and Ms. Alvarez to be here at 9 a.m. to hear their testimony, and we'll begin at that time.

Also, without objection, we will enter into the record several written statements that have been submitted regarding Judge Thomas' nomination, and they will be included in the record.

We are recessed until 9 a.m. tomorrow morning.

[Whereupon, at 9:37 p.m., the committee was recessed, to reconvene at 9 a.m., Friday, September 20, 1991.]

[Additional documents submitted for the record are contained in part 4, appendix.]