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TESTIMONY

OF

BENJAMIN L. HOOKS
EXECUTIVE DIRECTOR

OF THE

NATIONAL ASSOCIATION

FOR THE

ADVANCEMENT OF COLORED PEOPLE

ON THE

NOMINATION

OF

JUDGE CLARENCE THOMAS

FOR THE

SUPREME COURT

OF THE

UNITED STATES

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

September 20, 1991

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to present the views of the National Association for the Advancement of Colored People (NAACP) in opposition to the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court of the United States. I am Benjamin L. Hooks, Executive Director of the NAACP.

The National Association for the Advancement of Colored People is the oldest and largest civil rights organization in the nation.[1] The NAACP has over 500,000 members with over 2100 branches in the 50 states, the District of Columbia and abroad. The NAACP is singularly committed to the empowerment and protection of African Americans under the Constitution through principles of equal justice under law for all persons in the United States.

Introduction

The NAACP's decision to oppose the confirmation of Judge Thomas for the Supreme Court has been especially difficult for us because of our belief -- shared among many African Americans -- in the particular importance of having African Americans on the Supreme Court. As Executive Director of the NAACP, I am aware that our decision

[1] The NAACP was organized on February 12, 1909, on the 100th anniversary of President Lincoln's birth, in response to an epidemic of race riots which swept the country in the early 20th century.

to oppose Judge Thomas has sparked a firestorm of controversy. Some rather harsh questions have come both from our predictable detractors, as well as some who are usually our allies.

Some individuals have tried to equate the NAACP's opposition to the confirmation of Judge Thomas with rejection of his avowed "self-help" philosophy. Others have claimed that the NAACP is trying to suppress the views of an African American who disagrees with us, and have asserted that we are betraying the concept of "racial solidarity". Finally, some have argued that we are ignoring the importance of adding the unique perspective of an African American born in poverty to an otherwise all-white, privileged court.

After all, the NAACP has always endorsed self-help initiatives that foster individual achievement among African Americans. But the NAACP cannot support a nominee to the Court who disparages a meaningful role of government in shaping programs that address pervasive discrimination and thus make individual achievement more possible.

The NAACP certainly supports free speech, and we recognize its importance to the fundamental interests of all Americans. We also recognize that there has always been, and should be, a diversity of views among African Americans.

However, we also know that rulings of the Supreme Court have been central to the social, political and economic advancement of African Americans. Therefore, the NAACP has long held the view that race alone cannot be the deciding factor governing our actions on Court appointments.

We are concerned that all of the sound and fury has drowned out discussion of the real basis for our opposition to Judge Thomas -- his public record. The NAACP believed, and we still believe, that the only way to determine whether to support a Supreme Court nominee is to evaluate his or her record of competence and fairness before they are confirmed.

It was this belief which led the NAACP's Board of Directors to examine the public record of Judge Thomas with care and deliberation. Our review included consideration of a thorough report prepared by our staff with input from scholars of law and history.[2] Additionally, we requested and received direct information from the nominee and his supporters, upon which we could assess his views on several issues of concern to us.

We also reviewed the history of the NAACP, recognizing that from its inception, the NAACP has been an organization willing to speak truth to the powerful on behalf of African Americans. After carefully considering Judge Thomas' record and our own history of struggle, the NAACP Board concluded that Judge Thomas not only opposes legal principles that have enabled African Americans to advance, however slowly, toward true equality; he also helped subvert efforts to translate these principles into reality.

Moreover, we have concluded that in many ways, Judge Thomas' opposition to positions of importance to us has been more pronounced and strident than that of previous Supreme Court nominees whom the NAACP also opposed.

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[2] See Appendix I, "A Report on the Nomination of Judge Clarence Thomas as Associate Justice of the United States Supreme Court", National Association for the Advancement of Colored People, August 15, 1991.

We recognize that many in the African American community know little about Judge Thomas' views on important questions of constitutional law. And unfortunately, the limitations inherent in the confirmation process have meant that Judge Thomas' record has received only limited attention. Those in the African American community who know little of his record often respond to Judge Thomas' nomination with an understandable measure of racial pride that obscures other considerations. We believe that recently announced polls showing support for Judge Thomas among African Americans reveal very little about the level of awareness among African Americans about the nominee's stated views and his record.

Not surprisingly, Judge Thomas has preferred to focus during his testimony before this Committee on his admirable, personal triumph over poverty. However, it is important to note that not even the most ardent supporters of Judge Thomas have attempted to defend their position on the basis of his record. They appear to support him in spite of his record, not because of it. Instead, they have reminded us, time and time again, about the harsh circumstances of his childhood and the strength of his character forged from the difficulties of his early life.

The NAACP also takes pride in the personal accomplishments of Judge Thomas. As an organization, one of whose primary purposes is the collective advancement of African Americans, the NAACP is well aware of the present day to day difficulties faced by our people. The agenda of the NAACP includes litigation, advocacy, and social programs which go to the heart of some of the most pressing problems facing African Americans today.

As an African American growing up in a rigidly segregated society, I have felt the sting of overt and blatant prejudice and segregation. Countless scores of African Americans have lived through the debilitating circumstances of poverty and discrimination, and yet excelled through faith, determination, hard work and help from others.

We are a noble people; we have a proud heritage. We have been loyal to our beloved nation; we have chopped cotton, cropped the tobacco, dug the ditches, plowed the fields, carved highways through mountain ranges, built railroads through swamps. Yet, we have been told again and again that we must wait for equal justice under the law. Our determination has been borne from our respect for our heritage and faith in our struggle. Many have chosen not to abandon the struggle or to become preoccupied with personal achievement over collective group advancement.

Despite Judge Thomas' compelling personal story, the interests of African Americans would not be well served, if after his confirmation to the Court, he dismantled the consensus elements of our nation's civil rights policy. The prospect of this occurrence is heightened by evidence drawn from the record Judge Thomas has amassed over the past decade.

Importance of the Supreme Court

Perhaps it would be useful to frame the discussion of Judge Thomas' confirmation and the NAACP's decision to oppose him in a slightly broader historical context. The history of the NAACP's efforts to advance the interests of African Americans makes us

particularly sensitive to the increasingly important role in American life played by the Supreme Court.

As the final arbiters of the American constitutional system, the Justices of the Supreme Court collectively exercise an influence on the destiny of America unequalled by any other branch of government. When the NAACP was still in its infancy, two important legal victories for the organization had much to do with shaping the Association's institutional view on the importance of the Supreme Court. In 1915, the Supreme Court ruled Oklahoma's "grandfather clause" unconstitutional[3] and two years later, the Court invalidated a Louisville ordinance requiring residential segregation.[4] These victories propelled the NAACP on an aggressive campaign to use the courts and political advocacy to change the dire circumstances of African Americans.

It is not surprising, therefore, that the NAACP has a long historical record of carefully scrutinizing the social and political views of Supreme Court nominees, as well as their judicial philosophies, in determining whether they should be subsequently confirmed by the Senate.[5]

As early as 1912, for example, the NAACP opposed the nomination of Judge Hook to the United States Supreme Court because of his views on race issues and other

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[3] Guinn v. U.S., 238 U.S. 347 (1915). Under the "grandfather clause", which was a part of a 1910 amendment to the Oklahoma sate constitution, a person could become a registered voter if he had served in the armies of the U.S. or the Confederacy, or was a descendant of such a person, or had the right to vote before 1867. This method of disqualifying black voters was so effective that other southern states inserted the clause in their constitutions as well.

[4] Buchanan v. Warley, 245 U.S. 60 (1917).

[5] The NAACP also opposed the Supreme Court confirmation of Justice Souter, Judge Bork, Justice Scalia, and Chief Justice Rehnquist.

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matters. Based on the NAACP's vigorous opposition, President Taft withdrew Judge Hook's nomination.

In April 1930, when President Herbert Hoover nominated Judge John J. Parker to a vacancy on the Supreme Court, Walter White, acting secretary of the NAACP, ordered a prompt investigation of Judge Parker's record.[6] The inquiry revealed that while running for governor of North Carolina in 1920, Judge Parker had approved of literacy and poll taxes for voters and had also approved of the "grandfather clause" which the Supreme Court had declared unconstitutional in 1915. The NAACP launched a successful national campaign to block Judge Parker's confirmation, which was rejected by the Senate by a vote of 39-41.

Twenty-five years later, after the Supreme Court's landmark decision in Brown v. Board of Education,[7] Judge Parker led the judicial resistance to integration in Briggs v. Elliott in which he wrote:

> It is important that we point out exactly what the Supreme Court has decided and what it has not decided...[A]ll that a state may not deny to any person on account of race the right to attend any school that it maintains...Nothing in the Constitution or in the decisions of the Supreme Court takes away from the people the freedom to choose the schools they attend. *The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation* [emphasis added].[8]

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[6] Richard Kluger, Simple Justice. (New York: Random House, 1975), pp. 141-142.

[7] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

[8] 132 F. Supp. 776, 777 (D.N.C. 1955).

The Briggs dictum was intended to offer aid and comfort to segregationists and to those who wanted to undermine the mandate of Brown.

Fortunately, in subsequent decisions such as Swann v. Charlotte-Mecklenberg Bd. of Ed.,[9] the Supreme Court went beyond Briggs through holdings which suggested that federal courts could (in limited circumstances) use busing to desegregate formerly de jure segregated school districts. Nonetheless, one must ask whether there would have been the Brown decision if Judge Parker had been elevated to the Supreme Court?

Judge Thomas has criticized the Supreme Court's decision in Brown on the grounds that it was based on "dubious social science" and on an inaccurate premise that separate facilities are inherently unequal.[10] The issue in Brown was not whether attending schools with whites would make black children smarter. The issue was whether racially segregated schools would ever receive the resources and benefits needed to make them equal to the competitive opportunities given to whites. Judge Thomas' rejection of equal protection jurisprudence in Brown is particularly disturbing.

Moreover, Judge Thomas seems to have embraced completely the Briggs dictum and the words of Judge Parker. Judge Thomas has denounced, for example, the entire line of school desegregation decisions implementing Brown as "disastrous."[11] Judge Thomas regards Green v. School Board of New Kent County,[12] one of the pivotal

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[9] 402 U.S. 1, (1971).

[10] See, Thomas, "The Higher Law Background of the Privilege or Immunities Clause of the Fourteenth Amendment, 12 Harvard Law Journal - Public Policy 63, p.68 (1989).

[11] Thomas, Civil Rights As a Principle Versus Civil Rights as an Interest, in D. Boaz, ed., Assessing the Reagan Years, 391, 393 (1988).

[12] 391 U.S. 430 (1968).

Supreme Court decision implementing the Brown decision, as an unwarranted extension, objecting that in Green "we discovered that Brown not only ended segregation but required school integration."[13]

Ironically, this seemingly obscure remark in effect endorses what was the single most effective tactic of southern segregationists determined to avoid compliance with Brown – the use of so-called "freedom of choice" plans, which were a subterfuge used to perpetuate the maintenance of segregated schools.

There is no question that if Judge Thomas' race were not a positive factor in consideration of his appointment to the Court, the NAACP might have opposed him on this basis alone. The NAACP believes that it was correct in opposing Judge Parker in 1930 and we also believe that our opposition to Judge Thomas today is correct.

Justice Marshall's Replacement

When Thurgood Marshall was nominated to become an Associate Justice of the Supreme Court, he enjoyed the overwhelming support of African Americans. By no means was race the only factor that generated African American's pride in Thurgood Marshall. The NAACP's national publication, The Crisis, set forth the views of many in the African American community:

> "The nomination of Thurgood Marshall to become an Associate Justice of the United States Supreme Court represents an historic breakthrough of transcendent significance. It is not merely that Mr. Marshall is the first Negro to be selected to serve at the summit of the nation's judicial structure. It is also that he achieved

[13] Id. at 391.

> national eminence as the No. 1 civil rights lawyer of our times -- the Special Counsel of the National Association for the Advancement of Colored People and the Director-Counsel of the NAACP Legal Defense and Educational Fund. As such he was in constant battle against entrenched tradition and archaic laws, emerging as victor in 23 of 25 encounters before the Supreme Court..."[14]

Justice Marshall's retirement from the Court would have significance for the nation no matter when it occurred. His departure at this time in our nation's history, however, is especially troubling to many African Americans because it could accelerate the conservative shift in Supreme Court doctrine on civil rights, *habeas corpus*, and individual liberties which has been evident now for the past two terms of the Court.

Last term, Chief Justice William Rehnquist announced the Court's intention to review existing precedents, particularly those decided by close margins over vigorous dissents[15]. When Justice Marshall warned in a dissenting opinion that the Supreme Court's new majority had launched a "far-reaching assault upon the Court's precedents,"[16] it was not only a parting reflection on the term that had just ended, but also a dire prediction about the Court's future.

Areas of Additional Inquiry

The NAACP believes that a thorough examination of the actual record of Judge Thomas would reveal to the public that Clarence Thomas fails to demonstrate a respect

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[14] "Associate Justice Thurgood Marshall", The Crisis, Vol. 74, No.6, July 1967, p.282.

[15] See Payne v. Tennessee, 59 U.S.L.W. 4814, 4819 (1991). Chief Justice Rehnquist's majority opinion suggested that the Court is not bound by considerations of stare decisis when cases are badly reasoned, particularly in constitutional cases where "correction through legislative action is practically impossible." at p.4819.

[16] Id.

for or commitment to the enforcement of federal laws protecting civil rights and individual liberties. Moreover, in a substantial number of speeches, writings and interviews, Judge Thomas has revealed an hostility to constitutional principles affecting civil rights protections, including the use of meaningful remedies for both past and present discrimination such as "goals and timetables".

Unfortunately, Judge Thomas' confirmation hearings have proven to be a missed opportunity to examine his beliefs on issues of fundamental importance to the nation. Although Judge Thomas has demonstrated intelligence and stamina, the American people no little more about his judicial philosophy today than we did prior to the start of these hearings.

Judge Thomas' nomination has captured the attention of the nation for reasons that go beyond his biography or even his color. He built his career within the Reagan Administration as a social critic who took forceful positions on some of the most divisive issues in the nation -- including affirmative action. After a decade of speaking out fearlessly and receiving much criticism from within the African American community, Judge Thomas seems to be *running from his earlier views. In his moment of destiny*, Judge Thomas has presented himself to this Committee as "a man who didn't really mean it" on many of his most ardently presented beliefs.

We concur with the view of Legal Times columnist Terence Moran, who suggests that Judge Thomas' hearings might have offered a rare opportunity to debate the issues he so passionately articulated.[17] From the perspective of the NAACP, there are

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[17] Moran, "Lost In The Hearings", The New York Times, September 15, 1991, p.E17.

important and honorable reasons for championing these policies, which we believe appeal to many Americans.

Notwithstanding the conclusion of Judge Thomas' testimony before this Committee, at least two areas which have been discussed extensively by Judge Thomas over the past decade have been only superficially addressed during these confirmation hearings. These issues are too important both to the individual victims of discrimination and to the country as a whole for the Committee to leave unaddressed; they demand further review. We would urge this Committee to consider the following:

I. The Case for Affirmative Action

As a general matter, affirmative action is the conscious use of race, sex or national origin in a active attempt to overcome the effects of both past and present discrimination. During his decade of public life, Judge Thomas has been particularly critical of most forms of affirmative action:

> "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."[18]

The goal of affirmative action is not to establish a permanent quota system, but rather to break the cycle of discrimination and to achieve equality which is real and not

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[18] Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!," 5 Yale Law & Policy Review 402, 403 n.3 (1987).

illusory. As Justice Blackmun has stated, "In order to get beyond racism, we must first take racism into account."[19]

The particular affirmative action measures utilized will vary in different situations. In the school desegregation context, affirmative action may mean taking the race of students and teachers into account in making school assignments. In a broader educational context, it may mean taking race into account in admissions policies, in order to recognize the potential of disadvantaged candidates who do not possess the traditional credentials. In the voting rights area, affirmative action sometimes means taking affirmative steps to register eligible African American voters and to assure that electoral systems and policies do not have a discriminatory effect on their ability to elect representatives of their choice.[20]

In the school and employment contexts, affirmative action does not mean admitting or hiring unqualified or less meritorious candidates. However, it may mean changing over time our narrow definitions of qualifications. Rather than abandonment of merit selection, affirmative action recognizes that we have rarely achieved that ideal. "[I]nstitutions of higher learning...have given conceded preferences to those possessed of athletic skills, to the children of alumni, to the affluent and to those who have connections with celebrities, the famous and the powerful."[21]

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[19] Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978).

[20] Statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. Regarding the Status and Future of Affirmative Action Before the Subcommittee on Civil and Constitutional Rights and Subcommittee on Employment Opportunities; July 11, 1985.

[21] Bakke, 438 U.S. at 404.

In addition to invidious discrimination based on race or other factors, our employment system has always relied upon such non-merit-related criteria as nepotism and cronyism. Reliance on facially-neutral devices such as test scores and paper credentials also may perpetuate the effects of past discrimination without contributing to selection of a qualified workforce. Affirmative action moves the nation closer to a true merit system, by shifting the focus to the job-related qualifications and potential of the individual candidates, whatever their race.

The concept of affirmative action first appeared in the program mandating that government contractors not discriminate in their employment practices. Executive Order 10925, issued by President Kennedy in 1961,[22] required most federal contractors not to discriminate in their employment practices on the grounds of race, color, creed, or national origin, and further required such contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin."

The mandate of nondiscrimination and affirmative action by government contractors was retained when President Johnson strengthened the program in Executive Order 11246, issued in 1965.[23] But the concept was not defined until 1970, when, under President Richard Nixon, a conservative Republican, the Office of Contract Compliance in the Department of Labor issued the following definition:

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[22] 26 Fed. Reg. 1977, (March 6, 1961).

[23] 30 Fed. Reg. 12319 (September 24, 1965).

> "An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate..."[24]

As now implemented, the Executive Order program requires most non-construction contractors of the federal government to analyze their work forces in light of the availability of qualified minorities and women in the available labor pool, and to devise a plan, including goals and timetables, to correct their under-utilization.

As you know, both the courts[25] and the Congress[26] have repeatedly approved of the use of affirmative action measures, including the use of goals and timetables, for the purpose of remedying the effects of past discrimination and segregation.

Attempt to Gut Executive Order 11246

In August 1985, the Reagan Administration promulgated a draft of a new Executive Order that would have gutted the long-standing principle that the tens of thousands of employers who are awarded contracts by the federal government must take positive steps to include qualified minorities and women in their work forces. The proposed new Order would have prohibited the government from seeking to have

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[24] "Order No. 4," 35 Fed. Reg. 2586, 2587 (Feb. 5, 1970); 41 CFR Part 60.2.10 (1970).

[25] United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987).

[26] In 1972, for example, while Congress was considering amendments to Title VII of the Civil Rights Act of 1964, there were several unsuccessful attempts to enact legislation ending the use of goals and timetables under the Executive Order. See 118 Cong. Rec. 2276 (1972).

contractors adopt affirmative action plans that include numerical goals and timetables. The Administration's effort was spearheaded by Attorney General Edwin Meese.

The effect of the new Executive Order would have been disastrous for African Americans, who even today, face unacceptably high levels of employment discrimination.[27] The DOL's monitoring of government contractors each year under E.O. 11246 has been the federal government's main weapon in combatting job discrimination.

The Attorney General and his supporters tried to frame the debate over modifications to the Executive Order as a referendum on quotas. They claimed that the Executive Order mandates quotas despite DOL regulations which clearly state that E.O. 11246 is not a quota program. Moreover, they sought to ignore important research, generated within the Administration itself, on the substantial benefits of the Executive Order program.[28]

Fortunately, a successful campaign was waged within the Administration led by Secretary of Labor William Brock, among others; and by an unusual coalition of civil rights organizations, business and labor mobilized to block the changes. Over 240 members of Congress, including Republican leaders such as Senator Robert Dole (KS)

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[27] See, "The State of Black America 1991," prepared by the National Urban League, "The Glass Ceiling," Study conducted within the Department of Labor, and "Opportunities Denied, Opportunities Diminished: Discrimination on Hiring," a study by the Urban Institute.

[28] Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on Employment Opportunities of Minorities and Women (1983).

and House Minority Leader Robert Michel (IL) sent letters to President Reagan urging him to back away from a new policy.

In the course of the effort to save the Executive Order, a consensus emerged, at least with respect to the benefits of E.O.11246. For example, the National Association of Manufactures stated in its support for the Executive Order:

> "...affirmative action has been, and is, an effective way of ensuring equal opportunity for all persons in the workplace. Minorities and women, once systematically excluded from many professions and companies, are now systematically included."[29]

Judge Thomas on Executive Order 11246

Judge Thomas has been especially critical of most affirmative action initiatives. This has been well documented in his speeches and writings, including his criticism of Executive Order 11246. Last week before this Committee, Judge Thomas suggested that this criticism reflected only his interest in political theory. However, there is much evidence to suggest that Judge Thomas' role in the effort to gut the Executive Order was more proactive than that of a mere political theorist.

Judge Thomas was a member of the Reagan Administration's transition team reviewing the work of the Equal Employment Opportunity Commission. The leader of the transition team was Jay Parker. Here are the findings of the "working document" prepared by the team:

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[29] William S. McEwen, Director of Equal Opportunity Affairs for Monsanto Company, testifying on behalf of the National Association of Manufacturers before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, July 10, 1985, p.1-4.

> "The program of "affirmative action" has been used by the EEOC and other government agencies to "implement" the Civil Rights Act of 1964. That act does not contain the phrase "affirmative action," nor does any other piece of legislation. It originates, instead, in Executive Order 11246, signed by President Lyndon Johnson in 1965. The order's original non-discriminatory intent was changed into a weapon to, in effect, endorse discriminatory hiring. Percentage hiring goals, first imposed upon the construction industry in the "Philadelphia Plan" and the "Long Island Plan," spread quickly to racial and sexual quotas in other industrial hiring."[30]

During the 1985 fight to save the Executive Order, the Reagan Administration's leader in the struggle for equal employment opportunity seemed curiously silent on one of the most important policy questions faced by the Administration. In a 1987 interview with reporter Juan Williams in The Atlantic Monthly, the issue of the Executive Order was apparently discussed with Judge Thomas. Williams reports that:

> "With arguments between Thomas and his critics growing louder, the EEOC chairman suddenly found himself warmly received at the Justice Department and the White House. He worked closely with Attorney General Edwin Meese in pushing for a change in an executive order that requires federal contractors to show that they have made efforts to hire minorities and women. Meese and Thomas argued that the order amounted to quotas, because contractors who failed to hire minorities and women were given goals and timetables that had to be met under pain of losing government contracts."[31]

In a subsequent speech in November 1987 at Claremont McKenna College, Judge Thomas presented his rationale for his apparent willingness to repudiate the Executive Order:

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[30] See, documents accompanying memorandum from Clarence Thomas to Jay Parker dated December 22, 1980, regarding EEOC/Civil Rights Act of 1980.

[31] Williams, "A Question of Fairness", The Atlantic Monthly, February 1987, p.82.

> "The Administration could have put much of the issue of racial preferences behind them by quickly modifying Executive Order 11246, so that it would prohibit racial and gender based preferences in government-funded projects. But it didn't, and hence the fruitless rhetorical war over "affirmative action" continued. (Note, incidentally, how affirmative action always meant preference for blacks – rarely were women or Hispanics included in Administration denunciations.) The term, AA, became a political buzz word, with virtually no substantive meaning. We could have maintained an aggressive enforcement of civil rights statutes, while demonstrating that racial and gender based preference policies in practice simply don't aid those they purport to. This is not to mention the violation of a sense of justice and the assumption of inferiority in racial set-asides policies."[32]

In Judge Thomas' analysis, affirmative action is impermissible under Title VII of the Civil Rights Act of 1964 because the term "affirmative action" never appears in the statute itself. Moreover, he suggests that since the Executive Order 11246 is the only legitimate basis for affirmative action, a modification of the Executive Order like that proposed in 1985 could easily resolve the problem of so-called race and gender-based preferences in the law.

Judge Thomas has embraced the kind of program under which he was admitted to Yale Law School. Judge Thomas has expressed the belief that this program employed a combination of race and socio-economic status as a basis for admission. It is apparent that in attempting to escape the brunt of his own personal attacks on race-conscious remedies or preferences in affirmative action programs, Judge Thomas has misrepresented the character of the Yale Law School program under which he was admitted as a student in 1972.[33] The program was, pure and simple, an express,

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[32] Remarks at Claremont McKenna College in November 16, 1987, p.5.

[33] See, Thomas Testimony in response to questions posed by Senator Arden Specter on September 13, 1991, p.31-32.

affirmative action program based on taking race into account -- in selecting among students who were deemed qualified -- in order to provide expanded opportunities for Blacks and other minorities disproportionately underrepresented in the student body.[34]

That program (we are advised) was and is consistent with the provisions of Title VI of the Civil Rights Act of 1964, which bans racial discrimination in all institutions receiving Federal financial assistance, including private universities like Yale.

Judge Thomas' record of writings and speeches, as well as his testimony before this Committee, indicates that he opposes on legal grounds such clearly legal forms of affirmative action as the Yale Law School Program. We are distressed by his opposition to this essential and proper form of affirmative action to remedy past and present racial discrimination, as well as its pervasive effects. We are distressed even more by his apparent attempt to conform the truth about the Yale program to fit his convictions.

It should be pointed out that the net effect of Judge Thomas' view would be to literally bar all meaningful forms of affirmative action, including the use of goals and timetables. Moreover, even the most benign of practices like the Yale program would be vulnerable.

Judge Thomas' view on the importance of Executive Order 11246 and his role in seeking its modification, as well as his general view of the constitutionality of affirmative action principles generally should be determined before the vote of this Committee is taken.

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[34] See, Statements and Supporting Documents submitted to the Washington Bureau of the NAACP in regard to the nomination of Judge Clarence Thomas by Richard Paul Thornell, Professor of Law, Howard University School of Law.

As Professor Charles Ogletree has suggested in his contribution to the NAACP's staff report on Judge Thomas' confirmation, Judge Thomas' writings present a construct that is oblivious to the complex structural factors of racism in America. The theme of self-help is most evident in Judge Thomas' autobiographical recollections. Judge Thomas' commencement speech at Savannah State College bears ample witness to his faith in self-help. Judge Thomas' speech is most eloquent. He exhibits what appears to be genuine humility and speaks movingly about racial discrimination.

However, no acknowledgement is made of the systemic exclusion of blacks from venture capital. No recollection of racist policies which have denied mortgages to blacks. No memory of the debilitating effects of overcrowded and underfunded schools is recalled.

Clarence Thomas' logic is straightforward: he sets up a liberal straw man (blacks have tried to abdicate all responsibility for their own liberation because of prejudice) and then knocks it down by citing some anecdotal evidence of those who survived. He infers, from the few, that everyone can make it.

What is even more disturbing, however, is the way in which this logic leads into blaming the victim. For it follows, if some blacks can make it in the face of discrimination, how does one account for the fact that so many don't make it? The obvious answer is that there is something wrong with them – they just don't work hard enough. The implication as well is that somehow, in reminding the African American community of systemic racism, white and black progressives have disabled the

community. It is not difficult then to extend this logic to a generalized opposition to affirmative action.

The American people have a right to know where Judge Thomas stands on these important questions.

II. Voting Rights

Of all the rights secured by the blood of African Americans, none is more precious than the right to vote. Without question, the Voting Rights Act of 1965 is the single most important piece of remedial legislation to emerge from the great Civil Rights Movement of the 1960's. The Voting Rights Act, in conjunction with the Civil Rights Act of 1964, has been largely responsible for the political empowerment of African Americans over the past twenty-five years.

The NAACP has a vital interest in preserving the right to vote for African Americans. The NAACP has been -- and it presently -- involved in voting rights cases across the United States brought under the Voting Rights Act. The NAACP routinely conducts voter education, voter registration and voter outreach programs designed to empower the African American community.

In 1988 Judge Thomas denounced, without identifying the cases, several Supreme Court decisions applying the Voting Rights Act:

> The Voting Rights Act of 1965 certainly was crucial legislation. It has transformed the politics 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.[35]

Judge Thomas' observations at the Tocqueville Forum are consistent with his statements that the 1982 Voting Rights amendments to Section 2 were "unacceptable."[36] Presumably, the Supreme Court decisions referred to by Judge Thomas include Thornburg v. Gingles[37]. The Gingles decision implemented the 1982 amendments to Section 2 of the Voting Rights Act, which prohibits election laws and practices with a racially discriminatory effect. The most important application of this prohibition is to forbid schemes dilute minority voting strength.

At the hearings last week, Judge Thomas spoke approvingly of the Voting Rights Act. However, he expressed difficulty in accepting the "effects test", which is the heart of meaningful enforcement of the Voting Rights Act.

Further confirmation testimony from the nominee raise troubling questions concerning his understanding of Supreme Court interpretation of the Voting Rights Act. His awkward attempts to clarify statements he has made regarding Supreme Court rulings in the area of voting rights present a flawed account of the law. His testimony in this regard has been quite confusing. Judge Thomas has not made it clear whether his negative discussions about voting rights decisions reveal his belief that the law should be

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[35] Thomas, Speech at the Tocqueville Forum April 18, 1988, p.17.

[36] Thomas, Speech to the Heritage Foundation, June 18, 1987, p.4; Speech at Suffolk University, March 30, 1988, p.14.

[37] 478 U.S. 30 (1986).

changed or instead reflect his ignorance of the law. African Americans cannot be comforted by his ambivalent responses.

At the time his remarks were made at the Tocqueville Forum it appears that they were crafted to serve a conservative political agenda, the judicial acceptance of which would cripple the Voting Rights Act as an empowerment tool for enabling minorities to elect representatives of their choice. His statements during the confirmation hearings that he was concerned about the promotion of proportional representation for minorities flies in the face of the reality that those concerns had already been resolved in both Congressional legislation and the Supreme Court decision in Thornburg.

Judge Thomas emphasized at his confirmation hearing that his concern about interpretations of the Voting Rights Act rested on his judgment that these rulings presuppose that racial and ethnic groups will inevitably vote in blocs. It is well established in voting rights litigation that racial bloc voting is not presupposed, it must be proven. In Thornburg, the Supreme Court explained that legally significant racial bloc voting occurs only when the voting behavior of a white majority results, in the absence of unusual circumstances, in the defeat of candidates preferred by minority voters.[38] The persistence and pervasiveness of racial bloc voting is established by evidence presented in several voting rights cases.[39] Further legislation extending the Voting Rights Act

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[38] Thornburg v. Gingles, 106 S.Ct. 2752, 2767 (1986).

[39] See, Book Review, Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act, by Pamela S. Karlan and Peyton McCrary, in the Spring 1988 issue of the Journal of Law and Politics at p.760.

explicitly says that no group is entitled to legislative seats in numbers equal to their proportion of the population.

The future of voting rights protection for minorities is of extreme importance. Last term the Supreme Court significantly extended the reach of judicial protection under the Voting Rights Act.[40] Moreover, the Department of Justice has objected to legislative redistricting plans in Louisiana and Mississippi on the grounds they would fragment and thereby continue to vitiate the black vote.

Conclusion

The life story of Judge Thomas is, indeed, compelling. But it should not be the principal basis of his confirmation to the Supreme Court. The many contradictions between the record compiled by Judge Thomas before his nomination, and the opinions offered during his testimony before the Senate Judiciary Committee are troubling. We find it difficult to believe the suggestion that he has simply changed his mind on so many issues. As Senator Specter stated on September 16, 1991, the last day of Judge Thomas's testimony "Your writings and your answers are inconsistent; they're at loggerheads....". Other Senators have raised similar concerns about the consistent discrepancies between Judge Thomas's written record and oral testimony before the Judiciary Committee.

Those who have gone beyond their own individualistic concerns to address the broader concerns of all humanity have not gained civil rights victories without a price.

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[40] See, esp. Chisom v. Roemer 111 S.Ct. 2354 (1991) where the Court held that judicial elections are covered by Section 2 of the Act.

We have learned to mark the counsel of Frederick Douglass, who said, "We may not get everything we pay for, but we shall certainly pay for everything we get."

The NAACP believes:

> Our people who want freedom and justice must take the lead in fighting for it. We must be prepared to die for it, just as our strongest black leaders have done before us. We must not only be smart but smarter. We must not only be wide awake, we must be forever vigilant. We must not only clean up our own backyards, we must insist that America cleans up its act and face up to its misdeeds. We need not be perfect, but we have to be truthful, honest and proud.

We know of no civil rights organization that urges confirmation of Judge Thomas, based on his public record. To ameliorate strong concerns raised by that record, and his statements on civil rights protection, it has become apparent that the nominee has chosen to distance himself from past pronouncements through evasion and skewed logic during these hearings, rather than to defend or to clarify his controversial record. Thus, in Senator Heflin's words, the nominee remains, in part, an enigma.

In the final analysis, we are persuaded that the confirmation testimony presented by Judge Thomas fails to resolve the concerns we have raised about his public record or to reassure us that he is an suitable successor to Justice Marshall.

For these reasons, in the strong interests of all Americans, we have put reason above race, principle above pigmentation, and conscience above color. We urge the members of the United States Senate, to exercise their advise and consent authority by rejecting this nomination.