TESTIMONY BY REP. PATSY T. MINK

BEFORE THE SENATE JUDICIARY COMMITTEE

ON THE NOMINATION OF JUDGE CLARENCE THOMAS

SEPTEMBER 20, 1991

Thank you for giving me the opportunity to make my case against the confirmation of Judge Clarence Thomas to the United States Supreme Court.

I come before you as a woman, legislator, and a citizen to ask you to consider the implications of Judge Thomas' appointment as Associate Justice of the Supreme Court for women's equality and women's opportunities. Judge Thomas' record as chief of the Office of Civil Rights and of the Equal Employment Opportunity Commission reveals his disregard for women's legal rights to equal treatment in education and in employment.

At the helm of the Office of Civil Rights, Judge Thomas sought to narrow and to weaken women's Title IX guarantees of non-discrimination and equity in education. Placing his views and his agenda above existing law, he worked to narrow the scope and quality of Title IX safeguards available to women in educational institutions. He sought permission from the Justice Department to repeal established regulations, most especially including Title IX protections for women employed in educational institutions. He defied a court order to enforce Title IX through timely compliance reviews. He weakened enforcement of Title IX by retrenching OCR's monitoring role, accepting mere promises of remedial action by institutions against which complaints had been filed rather than demanding that institutions demonstrate compliance with the requirements of Title IX. He substituted his own interpretation of Title IX for established regulations governing admissions, employment, athletic, and counseling practices which have an adverse impact based on sex. Judge Thomas imposed an intent standard on Title IX enforcement, making it difficult to prosecute broad violations of women's educational rights. As a result, during Judge Thomas' short tenure at OCR, the remedies available to women aggrieved by discrimination in education were narrowed. The agency responsible for protecting women's rights in education instead made it easier for educational institutions to discriminate.

As one of the original authors of Title IX I am acutely disturbed by Judge Thomas' contempt for the law of educational equity. Title IX is the fountainhead of women's equality of opportunity, not only in education but in employment and public life, as well. Education opens doors, and more important, creates choices. Judge Thomas' narrow view of the problem of

discrimination, combined with the benefit of the doubt he extended to institutions against which claims were made, showed his lack of commitment to women's opportunities and choices. More significant still, Judge Thomas' decision to eschew precedent, evade court orders, and shun legislative history with respect to Title IX enforcement is part of a larger pattern of imposing his own agenda upon the law and at the expense of the civil rights of women.

This pattern is further revealed if we look at Judge Thomas' records at the Equal Employment Opportunity Commission. Commissioner Thomas left a legacy of neglect for women's wage and job discrimination claims at EEOC. In 1988 the General Accounting Office concluded that Thomas' EEOC typically closed cases without adequately investigating employee's claims: by FY 1989, in fact, more than half of the individuals who filed complaints with EEOC got no relief. (By comparison, only 29% of complainants got no relief in FY 1980).

Most women who filed discrimination complaints against employers' fetal protection policies were ignored by Judge Thomas' EEOC. The agency charged with protecting working women's rights simply defaulted on enforcing Title VII's prohibition against intentional, sex-based discrimination. When the EEOC issued guidelines on fetal protection policies in 1988, it weakened women's Title VII protections by expanding employer defenses. Several years earlier, Judge Thomas' EEOC had participated in lower court cases, arguing that the stringent BFOQ (bona fied occupational qualification) test need not be met by employers implementing fetal protection policies. Rather, the EEOC argued, "business necessity" might be argued to justify the policy. Lower courts so ruled in two cases, creating precedents that the EEOC then incorporated into its own guidelines. Under Judge Thomas, then, the agency charged with enforcing Title VII lowered employers' threshold defense for at least one form of blatant, facial discrimination.

Working women aggrieved by wage discrimination fared no better than women aggrieved by fetal protection policies when they sought relief from Judge Thomas' EEOC. Judge Thomas may have convinced this committee that he didn't mean it when he quoted Thomas Sowell -- arguing that women don't have the skills for or interest in better-paying jobs, that they choose low-wage labor, that they choose to be unreliable workers because they choose to have babies. But his record at EEOC shows that he did mean it. He warehoused more than 250 disparate impact wage discrimination claims for more than three years while the EEOC tried to develop a policy. Meanwhile, straightforward Equal Pay Act cases -- where women and men performing the same work received different pay -- did not receive vigilant attention.

More strikingly, in the most important wage discrimination case pursued by the EEOC in recent years -- the **Sears** case -- Judge Thomas publicly disparaged his own agency for bringing the suit on behalf of women employed by Sears. The fact that Judge Thomas' EEOC did not initiate the case -- the Carter Administration EEOC filed the suit in 1979 on behalf of women segregated into lower-paying jobs -- did not absolve him of his ethical professional obligation to the EEOC's clients, the women workers at Sears. Judge Thomas was resoundingly criticized for his comments about the case, including by the esteemed former Chair of the House Education and Labor Committee, Augustus Hawkins, and by the trial judge. The EEOC lost the case, never appealed, and, under Judge Thomas, ceased to take on cases on behalf of large numbers of women.

Judge Thomas' conduct during the **Sears** case, clearly privileged his own views and agenda over the precedents and legal responsibilities of the EEOC. The **Sears** case is not an isolated example of Judge Thomas' disregard for law and government. His record on affirmative action while at EEOC and his public criticism of the Supreme Court's decision in **Johnson v. Santa Clara County** also expose the Judge's proclivity for rule by opinion and his disregard for the rule of law. Under Judge Thomas, the EEOC in 1985 effectively banned the use of goals and timetables in any settlements in which the EEOC was involved, and stopped enforcing goals and timetables in existing consent decrees. Thomas promised to lift the ban under pressure of his reconfirmation hearings in 1986. Though he promised to lift the ban, he continued to speak out against affirmative action. He condemned the Supreme Court's decision in **Johnson**, embraced Justice Scalia's very troubling dissent, and stated his hope that Scalia's dissent would provide a basis for overturning the decision. This raises serious questions not only about Judge Thomas' substantive views, but about his respect for **stare decisis**.

Judge Thomas' approach to discrimination law as the country's chief anti-discrimination officer bespeaks a man with a clear political agenda, an agenda which has filtered his interpretation and driven his non-enforcement of rights and remedies. So, too, does his list of heroes from whom he quotes or to whom he approvingly points: Lewis Lehrman, Thomas Sowell, Oliver North.

Now he asks you to believe that his record of actions, speeches, and writings is not a record at all, but merely a series of random quotations, philosophical musings, and highly context-specific decisions by a politically purposeless bureaucrat. In his testimony before this committee, Judge Thomas labored hard to show himself to be everywhere and nowhere, to have uttered words but not to have had opinions, to have taken stands but not really to have meant anything by them.

The confusion Judge Thomas has deliberately created about who he is, about what he thinks, and about how he thinks, ought to disqualify him from ascent to the High Court. He fails as a nominee on the merits of his own case. No one who cannot or will not articulate his view of constitutional interpretation, who cannot or will not share his view of fundamental rights, who cannot or will not admit to having a view of **Roe v. Wade**, and who cannot or will not show enough courage to stand by the convictions that have driven his actions and writing...no one, in short, who is a legal and jurisprudential **vacuum** deserves appointment to the body that guards our democratic rights and processes.

It is unfair to wise and courageous jurists -- female or male; black, latino, asian, indian, or white -- to settle for this appointment to the Court. It is unfair to the people who place their trust in law and democracy to give the power and responsibility to write judicial opinions to an unseasoned judge and sloppy reasoner who does not even read (by his own admission) the materials which he approvingly cites. And it is a grave injustice to the women of America to place the future of reproductive choice in the hands of someone who has habitually placed himself above law and precedent, who refuses to disclose what the reproductive rights "controversy" to which he has alluded is about, who will not explain how he approaches constitutional adjudication, and who will neither affirm nor deny that **Roe** is or should be settled law.

The reproductive rights questions that Clarence Thomas so clumsily ducked during five days of questioning are not trivial or inappropriate questions to ask of a Supreme Court nominee. Women's full equality and personhood depend on our ability to make reproductive choices. Women's health and women's lives depend on continued protection of reproductive decision-making as a realm of fundamental liberty. We should not ask how Clarence Thomas will rule in a particular case given particular facts. But we rightfully demand an answer when we ask of him: Does the fundamental right to privacy encompass a woman's right to terminate a pregnancy as handed down in **Roe**? And we deserve to know whether he believes -- not whether the Court has stated -- that the due process clause of the 14th Amendment encompasses a fetal right to life. The public has a right to know how a prospective Justice approaches rights, how he interprets the Constitution, and how he relates both to gender equality. Much is at stake here. The first right ever to be withdrawn from the American people may well be withdrawn by the Rehnquist Court. The reproductive right. And it will be taken away from American women.

Choice and personal welfare strike to the core of what's at issue in the Thomas nomination. Choice -- educational, occupational, and reproductive -- has been this society's chosen

pathway toward equality. But choice must be tied to the fairness and support that underpins personal welfare. It is not enough for a woman to have the choice to attend a university, if her educational welfare in the university is put at risk because law Title IX enforcement means that sexual harassment goes unpoliced and unpunished. It is not enough for a woman to have the choice to be a nurse, if her economic welfare is put at risk because she hasn't chosen a less skilled, but male-dominated, and higher-paying job. And it is not enough for a woman to have the choice to seek a back alley abortion -- for women will find ways to make reproductive choices even if Roe is overturned -- if her health is put at risk by unlicensed practitioners in unsanitary locations. It is this range of women's choices and the legal protections that must accompany them for which the Clarence Thomas we know best -- as head of OCR and the EEOC and as "part-time political theorist" -- lacks understanding and commitment.

I urge you to reject Judge Thomas' nomination to the Supreme Court.