NOW Legal Defense and Education Fund
99 HUDSON STREET • NEW YORK, NY 10013 • (212) 925-6635 • FAX: (212) 226-1066

Testimony of Helen Neuborne, Esq.

NOW Legal Defense and Education Fund

Presented at the Senate Judiciary Committee Hearings

on the Confirmation of Judge Clarence Thomas

as an Associate Justice of the U.S. Supreme Court

September 20, 1991

Helen Neuborne, Esq.
Executive Director

Alison Wetherfield, Esq.
Director, Legal Program

Mr. Chairman and Members of the Committee:

My name is Helen Neuborne. I am the Executive Director of the NOW Legal Defense and Education Fund, a women's rights legal and educational advocacy organization founded in 1970. Thank you for this opportunity to express our view that Judge Clarence Thomas should not be confirmed as an associate Justice of the Supreme Court.

We appreciate the efforts of the Committee -- especially its Chair -- to develop a complete record on which to base the Senate's decision whether to confirm the nomination of Judge Thomas.

That record, as developed before this Committee, contains three troubling components:

(1) Judge Thomas' past record, including his articles, speeches and performance as EEOC Chair;

(2) Judge Thomas' decision at the hearing to stonewall and to present the Committee with a selective silence concerning his views on the constitutional issues surrounding abortion; and

(3) Judge Thomas' disavowals of most of his past record.

There is no need for me to detail the record at length. Among the items that raise the most serious concerns are Judge Thomas' signature on a White House report calling for the repeal of Roe v. Wade; his praise for a speech calling for the criminalization of abortion; his adamant -- and selective -- refusal to discuss the legal issues surrounding abortion; his record at the EEOC; and Judge Thomas' utterly unconvincing disavowals of his past

statements on topics ranging from the competence of Congress to the separation of powers.

Viewing the record in the light most favorable to Judge Thomas, the best you can say is that serious doubt exists concerning his commitment to existing constitutional rights of critical importance to women and minorities.

The real issue, therefore, is what is the role of a Senator under the "advice and consent" clause when he or she is confronted with a nominee whose commitment to the constitutional rights of millions of Americans is seriously in doubt. If you are in serious doubt, should you defer to the President or should you exercise an independent judgment under the "advice and consent" clause?

It's clear that the record in this case creates an inescapable doubt concerning Judge Thomas' commitment to the protection of existing constitutional liberties.

We have now listened to Judge Thomas' testimony before this Committee and have heard nothing to calm our fears about the effect Judge Thomas' personal philosophy would have on the existing constitutional and statutory rights of women were he to be confirmed. Judge Thomas' assertions that he has set aside his most dearly held and often expressed views in the name of judicial impartiality simply do not ring true. Judge Thomas has stated that he praised extremist right wing articles he says he has never even read in an effort to convince conservatives to accept his agenda and he is apparently ready to disavow almost all his prior statements if it will convince this Committee to vote for his

confirmation.

His sudden and unconvincing confirmation conversion is not the only reason for our vote of no confirmation. We are also profoundly troubled by his retreat during these hearings into silence on crucial issues affecting women, in stark contrast to his open and forthcoming discussion of numerous other controversial legal issues that will undoubtedly arise during his tenure on the Supreme Court. Judge Thomas has sought to defend his selective refusal to reveal his judicial philosophy in the abortion area as necessary to maintain his impartiality as a judge. However, a similar concern with impartiality did not prevent him from discussing the equally controversial legal issues of church-state, the binding quality of precedent and the balance between the rights of the accused and the rights of victims - issues that will certainly arise before the Court during his tenure. His selective refusal to talk about a woman's constitutional right to choose whether to continue a pregnancy does not, therefore, foster an appearance of impartiality. Quite the contrary, it sends an ominous message that Judge Thomas has views on the subject that he dare not reveal because they would jeopardize his nomination - an ominous message of covert "partiality" that is reinforced by his numerous public statements and actions in the area.

One year ago, I urged this Committee to refuse to permit then-Judge Souter to avoid discussing his legal philosophy in this area with the Committee. Unfortunately in the absence of clear prior statements from Justice Souter on this issue, a majority of the

Committee elected to gamble on Judge Souter's silence. American women suffered the first consequences of the Committee's gamble when Justice Souter cast the crucial fifth vote in Rust v. Sullivan depriving poor women of desperately needed information from their doctors concerning the availability of abortion as a lawful treatment option. President Bush, who nominated both Justice Souter and Judge Thomas, threatens to veto any bill which undoes the Supreme Court's handiwork in Rust. We simply cannot afford to allow you to gamble with the lives of women yet again. Please do not permit Judge Thomas, who, unlike Judge Souter, has a public record of hostility to Roe v Wade, to single out abortion rights as the only matter he refuses to discuss.

Judge Thomas signed a White House report calling for the overturning of Roe v. Wade. Judge Thomas publicly praised an article that urged the recriminalization of abortion, despite Roe v. Wade. Given that public record of hostility, for the Committee to accept Judge Thomas' silence and his incredible explanations that he never read that report or article as adequate exploration of the issue would be to break faith with America's women and with your own obligations as Senators.

The Constitution vests "advice and consent" power in the Senate precisely to prevent the President from stacking the Supreme Court with nominees that reflect a single, narrow judicial philosophy. When, as now, a profound national division on many issues has resulted in a sustained division in control of the Presidency and the Senate, the Senate's "advice and consent" power

takes on extraordinary importance since, unless the Senate fulfills its responsibility in the confirmation process, the resulting Supreme Court may exclude the mainstream philosophies that have broad support in the American people.

The closest analogue to the Senate's "advice and consent" power is the President's power to veto legislation passed by both Houses of Congress. Both the "veto" and the "advice and consent" power permit one political branch of the government to check the other in order to assure an accurate reflection of the nation's democratic will.

President Bush has vetoed Congressional legislation twenty-one times in three years. He never defers to Congress' role. It is inconceivable that the Senate, exercising its veto power over Supreme Court appointments, will defer to the President's drive to stack the Supreme Court with nominees hostile to the rights of women and minorities.

If the "advice and consent" power is to fulfill its constitutional role, especially in eras of divided government, Senators must be prepared to exercise the same independent judgment in vetoing a Supreme Court nominee as the President exercises when he repeatedly vetoes the will of Congress. Many of you . . .

If, after reviewing the record before this Committee, you do not harbor significant doubts concerning Judge Thomas' willingness to support and defend critical constitutional rights of women and minorities, you should vote to confirm him. If, however, after reviewing the record, you believe that Judge Thomas poses a risk to

the rights of millions of Americans you should oppose his confirmation. Senators exercising the "advice and consent" power have no right to gamble with the lives of women.